BOLI ORDERS

Final Orders Issued By The Commissioner
Of The Oregon Bureau of Labor and Industries

VOLUME 8

Cited: 8 BOLI

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BOLI ORDERS

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INTRODUCTORY NOTE

This eighth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between June 16, 1989, and May 29, 1990.

Each Final Order is reported in full text under the official title of the order. Preceding each Final Order is a synopsis, which provides immediate identification of the subject matter of the case and of the primary rulings contained in the order. In the caption of each case the charged party is referred to as the "Respondent." Within the body of some cases the charged party is referred to as the "Employer," the "Contractor," or the "Applicant."

A complete table of the Final Orders in this volume begins on page v. For each Final Order the table shows the page at which the order begins in this volume.

The Bureau of Labor and Industries Digest of Final Orders contains an outline of classifications for BOLI ORDERS. Case holdings and points of Wage and Hour and of Civil Rights law are arranged under classification numbers. The Digest contains a table of the Final Orders and a subject index for the complete set of BOLI ORDERS volumes.

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In the Matter of
Ling Man Chan and Man-Sing-So,
dba LEE'S CAFE,
Respondents.

Case Numbers 19-89 and 20-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 16, 1989.

SYNOPSIS

The Commissioner found that Respondents, owners and operators of a cafe, both committed unlawful employment practices where one Respondent engaged in a course of verbal and physical conduct of a sexual nature toward two Complainants because of their sex. This conduct was offensive and unwelcome to Complainants, and had the effect of unreasonably interfering with their work performance, and of creating an intimidating, hostile, and offensive working environment. After one Complainant rejected this conduct, Respondent fired her. Respondent's deliberate conduct created a working environment that a reasonable person would have found intolerable, and the second Complainant was forced to involuntarily resign her employment with Respondents because of the intolerable working environment, constituting a constructive discharge. One Complainant failed to mitigate her damages before she accepted a job equivalent or superior to Respondents', and was awarded no back pay. The second Complainant was awarded back pay, which was offset by interim earnings from employment. The Commissioner awarded both Complainants mental suffering damages. ORS 659.030(1); OAR 839-07-550, 839-07-055.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held from February 8, to 10, 1989, in Room 240 of the Pendleton State Office Building, 700 SE Emigrant Street, Pendleton, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Linda Lohr, an employee of the Agency. Sheri C. Gray (Case No. 19-89) and Paula Thompson (Case No. 20-89) (hereinafter Complainants) were present throughout the hearing. Ling Man Chan and Man-Sing-So (hereinafter Respondents*) were represented by David M. Blanc, Attorney at Law. Respondents were present throughout the hearing. Respondents were accompanied and assisted by an interpreter, Vivian Lee, throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Patricia Clark (by telephone), Investigative Supervisor for the Civil Rights Division of the Agency; Angela Feller, a former employee of Respondents; Jennifer Fenton, a former employee of

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* Evidence on the record shows that Respondents were often referred to collectively as "Lee's Cafe, Respondent" (singular). Throughout this order any reference to "Lee's Cafe, Respondent" or to "Respondent" is to be read to refer to both Respondents.

Respondents; Complainant Sheri Gray; Susan Moxley, Senior Investigator for the Civil Rights Division of the Agency; Lisa (Neilson) Patterson, a former employee of Respondents; Kippie Pfingsten (by telephone), a former employee of Respondents; Complainant Paula Thompson; and Carrie (Briggs) Wilson, a former employee of Respondents.

Respondents called the following witnesses (in alphabetical order): Respondent Ling Man Chan; Monica Jenkins, a former employee of Respondents; Teri Kellas, a current employee of Respondent Man-Sing-So; Tiah Peterson, a current employee of Respondent Man-Sing-So; Respondent Man-Sing-So; and Gloria Wallace, a current employee of Respondent Man-Sing-So.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On July 28, 1987, Complainant Gray filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent Lee's Cafe had discriminated against her on the basis of sex, in that Respondent had sexually harassed her and terminated her employment without reason.

2) On October 20, 1987, Complainant Thompson filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent Lee's Cafe had discriminated against her on the basis of sex, in that Respondent had sexually harassed her to such an extent that she was forced to take a constructive discharge

3) After investigation and review, the Agency issued in each case an Administrative Determination finding substantial evidence of unlawful employment practices, under ORS 659.030(1)(a) and (b), by Respondent Lee's Cafe.

4) The Agency attempted to resolve the complaints by conference, conciliation, and persuasion, but was unsuccessful.

5) On December 7, 1988, the Agency prepared and duly served on Respondents Specific Charges in case number 19-89. The Specific Charges alleged: that at all times material herein Respondent Lee's Cafe was jointly owned and operated by Ling Man Chan and Man-Sing-So; that Respondents, through Ling Man Chan, had repeatedly engaged in a course of conduct designed to harass, intimidate, humiliate, and embarrass Complainant Gray because of her sex; that Complainant Gray had found the conduct unwelcome and offensive, and she had repeatedly asked Respondent to cease; and that said conduct created a hostile and abusive environment. It alleged that the conduct constituted discrimination based upon sex against Complainant Gray in the terms and conditions of her employment, in violation of ORS 659.030(1)(b). The Specific Charges also alleged that Ling Man Chan solicited a lewd, sexual act from Complainant Gray in front of customers, that she rejected the solicitation, and that Respondent then threatened Complainant Gray with a knife and terminated her employment with Respondents. It alleged that the termination of Complainant because of her refusal to engage in a sexually offensive act with Respondent constitutes discrimination in employment on the basis of sex, in violation of ORS 659.030(1)(a).

6) Also on December 7, 1988, the Agency prepared and duly served on Respondents Specific Charges in case number 20-89. The Specific Charges alleged: that at all times material herein Respondent Lee's Cafe was jointly owned and operated by Ling Man Chan and Man-Sing-So; that Respondents, through Ling Man Chan, had repeatedly engaged in a course of conduct designed to harass, intimidate, humiliate, and embarrass Complainant Thompson because of her sex; that Complainant Thompson had found the conduct unwelcome and offensive, and she had repeatedly asked Ling Man Chan to cease; and that said conduct created a hostile and abusive environment. It alleged that the conduct constituted discrimination based upon sex against Complainant Thompson in the terms and conditions of her employment, in violation of ORS 659.030 (1)(b). The Specific Charges also alleged that, because of Ling Man Chan's conduct, Respondent deliberately made Complainant Thompson's working conditions so intolerable that she was forced to involuntarily resign her employment. It alleged that the constructive discharge, because of her refusal to continue working in an intolerable, intimidating, and offensive work environment, constituted discrimination in employment on the basis of sex, in violation of ORS 659.030(1)(a).

7) With the Specific Charges, the Forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

8) On December 8, 1988, the Forum sent a notice to all participants in contested cases 19-89 and 20-89 that the cases were consolidated because of common questions of law and fact evident from documents in the Forum's file.

9) On December 27, 1988, the Forum received Respondents' answers to both cases. In case number 19-89, Respondents denied the allegations mentioned above in the Specific Charges, and stated that Ling Man Chan had sold his interest in Lee's Cafe to Man-Sing-So on October 21, 1987, and Ling Man Chan was no longer involved in the business. In case number 20-89, Respondents denied the allegations mentioned above in the Specific Charges, and alleged that Complainant Thompson had quit her employment by her own decision and not because of the conduct of the Respondent. Respondents repeated that Ling Man Chan had sold his interest in Lee's Cafe to Man-Sing-So on October 21, 1987.

10) Pursuant to OAR 839-30-071, Respondents and the Agency each filed a Summary of the Case for each case.

11) On February 3, 1989, Respondents' counsel called the Forum to request a postponement of the hearing set to begin on February 8, 1989. Respondents' counsel later sent the Forum a motion and affidavit by facsimile machine. The the Agency opposed the motion. The Forum denied the motion because Respondents failed to show good cause for the postponement.

12) A pre-hearing conference was held on February 8, 1989, at which time the Agency and Respondents stipulated to facts that were admitted by the pleadings. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

13) At the commencement of the hearing, the attorney for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

14) Pursuant to ORS 183.415(7), the Agency and Respondents were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) During the hearing the Hearings Referee requested and received from the Agency a replacement page for an exhibit. The replacement page, which was more readable than the original page, was inserted into the hearing record and the original was removed.

16) Pursuant to OAR 839-30-102, an extension of time was granted for filing the Proposed Order in this matter.

17) On March 17, 1989, the Hearings Referee re-opened the contested case hearing record to accept additional evidence about Complainant Thompson's employment history following her employment with Respondents. The Forum granted the Agency and Respondents until March 31, 1989, to submit additional evidence.

18) On March 30, 1989, the Agency submitted a letter to the Forum stating the Agency and Respondents stipulated to facts regarding Complainant Thompson's employment history.

19) On March 31, 1989, Respondents' attorney called the Hearings Unit to report the stipulations reached with the Agency, see 18 above, and to request more time to obtain additional relevant employment records.

20) On April 4, 1989, the Hearings Unit received a letter from Respondents, dated March 31, regarding the stipulations. In addition, Respondents proposed that additional evidence could be collected and submitted, with Complainant Thompson's permission, within two weeks. Respondents requested the Agency's reply to the proposal.

21) On April 17, 1989, the Agency opposed Respondents' proposal to collect and submit additional evidence after the March 31, 1989 deadline set by the Hearings Referee on the basis that the request was untimely and the evidence would not appreciably alter the determination regarding Ms. Thompson's damages.

22) On April 17, 1989, the Forum ruled that the record closed on March 31, 1989, that the Hearings Referee had sufficient facts with which to make findings of fact, and that Respondents' request for additional discovery after March 31, 1989, was untimely.

23) On April 21, 1989, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing. Pursuant to OAR 839-30-165, the Agency and Respondent had 10 days to file exceptions to the Proposed Order. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Lee's Cafe was an eating and drinking establishment in Pendleton, Oregon, under an assumed business name, owned and operated jointly by Ling Man Chan and Man-Sing-So, and was an employer in the State of Oregon with one or more employees subject to the provisions of ORS 659.010 to 659.435.

2) At the time of hearing, Man-Sing-So was the sole owner of the cafe. He bought out Ling Man Chan's interest in the cafe on October 21, 1987.

3) Respondent Man-Sing-So was also known as Jack. (He may be referred to as Jack in this Order).

4) Respondent Ling Man Chan was also known as Ray or Raymond. (He may be referred to as Ray in this Order).

5) Jack and Ray worked as cooks in the cafe. They usually worked together unless one of them was running an errand. Although Respondents hired some of the waitresses, they were not very involved in training, scheduling, or disciplining waitresses. The waitresses handled those matters themselves. Jack or Ray would tell the "head" waitress to take care of any problems with the waitresses.

6) Ray was very moody. When he was angry at a waitress, he would deliberately botch that waitress's order, or cook it late, or refuse to put the order up for her. He grunted at the waitresses. Many of the waitresses did not like Ray.

7) Complainant Gray is a female.

8) Complainant Gray was employed by Lee's Cafe as a waitress between March 9, 1987, and April 20, 1987.

9) Around March 23, 1987, Complainant Gray suffered an on-the-job injury to her knee. Respondents did not contest the claim. Gray received a temporary total disability, and was off work due to the injury until April 12, 1987.

10) Jack was injured in a car accident in January 1987. Around April 3, 1987, he went to Portland and spent three days in a hospital. He was not in Pendleton when Gray returned to work from her on-the-job injury. He returned to Pendleton on May 9 or 10, 1987.

11) A couple of days after Complainant Gray started to work for Respondents, Ray touched her breast with his elbow as she was getting a soft drink. Gray told Ray to keep his hands off of her, and never to do that again. Ray laughed and went into the kitchen. One time before the cafe opened, as Gray was standing by the coffee machine, Ray rubbed her buttocks up and down with his hand. Gray slapped his hand away, and Ray laughed. Another time, Ray grabbed

Gray by the hips and moved her, without saying anything. Gray told him to keep his hands off her, and he moved away. Ray began touching Gray's breasts with his elbows "all the time," that is, everyday that Gray worked. Once, when Gray sat down at the break table, Ray sat next to her and rubbed the inside surface of her thigh. Gray told him "to get out of there," and to move, and Gray moved to a different table. Gray saw Ray touch other waitresses in a sexual way. One waitress, Janet Robinson, warned Complainant Gray that Ray liked to touch the waitresses and ask them to go out with him. Once when Gray asked for some honey, Ray replied, "you're my honey," and he and Jack laughed. Ray called Gray a "cunt" and commonly said "eat me" as Gray put up her order tickets.

12) Complainant Gray told Monica Jenkins, Lisa Patterson, Janet Robinson, and Carrie Wilson that Ray was sexually harassing her.

13) Wilson saw Ray touch Complainant Gray, and heard him yell at Gray through the window between the kitchen and the seating area.

14) Jack was present and knew that Ray sexually harassed the waitresses. Jack made no apparent effort to stop it. When Jack saw Ray touch Complainant Gray, he would laugh or look away. When Gray asked Jack why Ray "does it," Jack said that Ray likes girls. Jack said he did not do anything about it because it was none of his business.

15) While Jack was in Portland, Ray touched the waitresses more than when Jack was at the cafe, and the working environment of the cafe became worse.

16) Two days before Complainant Gray was fired, she was alone with Ray after closing. Ray turned up the heat in the cafe. When it became hot, Gray said she was going to turn it down. Ray told her not to. When she asked him why, Ray said "so you take your shirt off." Gray turned down the heat, and left the cafe when her fiancé came.

17) The next day when Gray got to work, Ray was angry with her for not finishing up her work from the night before. He told her, "you fired. You no do your work right." After she told him why she left the night before, he laughed and walked off. Gray went about her work, because she did not think she had been fired. Later, Ray would not cook Gray's orders. Ray said, "eat me" to Gray. The customers heard that and asked Gray if she knew about the Bureau of Labor and Industries, and encouraged Gray to contact that agency.

18) Ray called Jack in Portland and reported that, since Gray returned to work from her knee injury, she was lazy and was arguing with another waitress, Wilson. Jack told Ray to decide about firing Gray.

19) On Gray's last day of work, Ray was angry at her and would not cook Gray's first order. Ray had put her order ticket behind other order tickets that had come in later. Gray went into the kitchen and said that she would cook the order. Ray said that she was not to come into the kitchen except to "eat me." Gray was angry and left the kitchen. Ray yelled for her to "get back into this kitchen and eat me." Customers could hear the yelling and they laughed. Complainant Gray took her apron off and threw it at Ray. He yelled, "you fired; you get out of my restaurant," and waved his knife at her. Gray was frightened and left.

20) Ray told Jack that he fired Gray because she did no work when there were no customers.

21) Complainant Gray found Ray's comments and touching to be sexually offensive and unwelcome. Ray's conduct made her angry, which Ray apparently wanted. She hated to go to work because she was afraid of Ray. Sometimes she would call her fiancé, who lived nearby, to come to the cafe when she felt afraid. When she had to close up the cafe alone with Ray, she would call her fiancé, who would come and sit in the cafe until she left. Toward the end of her employment with Respondents, Ray's actions began to affect her ability to do her job.

22) When Complainant Gray first started working for Respondents, there was a problem with money missing from the cash register. It was Respondents' policy that only one waitress would operate the till. When Lisa Patterson worked, only she operated the till. However, when Lisa was not there, every waitress on a shift would use the till. When two waitresses worked together, which was common, there was no way to determine who was responsible if the till did not balance. There were times when Respondents would take money out of the till, and only record it mentally. Neither Jack nor Ray ever talked with Gray about the shortages. Respondents never accused her of taking money from the till.

23) Before Complainant Gray worked for Respondents, Ray told Gloria Wallace that he suspected one of the waitresses, Tina, of taking money out of the till. Respondents did not fire the waitress; instead they gave her another chance. Jack also suspected Kippie of theft, but did not fire her. According to Wallace, "they didn't seem to like to fire anybody." Whenever Wallace took money from the till, she would leave a note. She did not know if other waitresses did the same.

24) Monica Jenkins worked as a waitress with Complainant Gray during a couple of shifts. She believed Gray was an "OK" waitress. Carrie Wilson also worked with Gray and thought that she was a good waitress, but that sometimes she forgot to do her sidework, such as filling the salt and pepper shakers, stocking napkins and other supplies, putting things away, and cleaning tables. Lisa Patterson worked with Gray, and thought she did a good job with her customers. Jack thought Complainant Gray was a medium waitress, that is, not too good and not too bad.

25) During her employment with Respondents, Complainant Gray earned $3.35 per hour, plus tips. She usually worked from 5 p.m. until closing, around 9 p.m. From March 9 to 15, she worked each day and a total of 27 hours. She worked March 20 and 21, for a total of 6.25 hours. Her time sheet shows a total of 12.75 hours worked on April 17 to 19.

26) After her discharge, Complainant Gray waited until the end of June or early July 1987 to seek other employment. At that time, she took a job as a waitress with Kopper Kitchen.

She earned $3.35 per hour, plus tips, and worked about 30 hours per week. She worked there for one month. She also took a job at the end of June or early July 1987 with Nova Enterprises. She earned $4.37 per hour, and worked fewer than 20 hours per week. She did not use Lee's Cafe as a reference with either employer. Complainant Gray quit both jobs in late July or August 1987, because she moved away from Pendleton. During the next year, Gray did not seek employment, except for two months when she was self-employed providing home health care, working as a housekeeper, and doing odd jobs. On average, she earned $100 per week during those two months. She moved back to Pendleton in late November 1988. In December 1988, she took a job at Don's Cafe, a Chinese restaurant. She earned $3.35 per hour, plus tips of about $1 per day. She worked there a total of nine hours during one week. She quit that job to find a job with more hours, and because she was uncomfortable working in a Chinese restaurant. She went immediately to work for Denney's restaurant. She earned $3.35 per hour, plus tips of about $20 per day. She worked there for two weeks, about 40 hours in each week. She quit because she was looking for the "right job." She then worked at the Westward Ho for nearly two months, until she was laid off. She earned $3.35 per hour, plus tips, which ranged from $7 to $25 per day. She worked at most 20 hours per week. She immediately took a job with the Skyroom Restaurant and Lounge, where she worked at the time of the hearing. She earned $3.35 per hour, plus tips of $15 to $20 per day. She worked 30 to 35 hours per week.

27) Gray suffered embarrassment and humiliation due to Ray's actions on the night before she was fired, because her customers heard Ray yelling "eat me" at her, and they later talked to her about it. She also was embarrassed and humiliated the night she was fired, when her customers heard Ray yelling at her, and when they laughed. Ray's actions affected the quality of her service to her customers and her tips. During the week following her firing, she was upset and suffered nightmares. She now has some fear of working for men. She took a job in a Chinese restaurant, but quit after three days because she was reminded of Ray and was uncomfortable. At the time of hearing, Complainant Gray worked for a woman at the Skyroom Restaurant and Lounge. She never sought counseling for her feelings described herein.

28) Complainant Thompson is a female.

29) Complainant Thompson was employed by Lee's Cafe as a waitress between September 15, 1987, and September 20, 1987.

30) Complainant Thompson was hired by Ray on September 15, 1987. She worked a split shift. First, she started at 11:30 a.m. and worked until the end of lunch. Then, she returned to work the dinner hours.

31) September 16, 1987 was Complainant Thompson's first day of work. Both Ray and Jack were there, cooking. They were both present during all of the shifts that Thompson worked. About one hour after Thompson started work, Ray came up behind her and touched her on the buttocks as she stood near a sink. There was enough room for two people around the sink. Thompson believed Jack saw Ray touch her, because Jack was looking at her after Ray touched her. Ray touched her many other times during the day, including rubbing her breast with his elbow. At first she thought the touching was accidental. Thompson first asked him, and later told him not to touch her. Ray laughed and returned to the kitchen where Jack was. Thompson told Gloria Wallace about the touching, and Wallace told her to try to stay away from Ray.

32) Angela Feller worked as a waitress for Respondents during the period Thompson worked there. She worked with Thompson once, and helped train her by showing her the menu. Feller never saw Ray touch Thompson, and never heard any sexual comments. She did not watch Thompson; nor could she observe the entire restaurant as she worked. Thompson never complained to Feller about Ray. Feller once had to tell Ray to get away from her when he got closer than necessary and made her feel uncomfortable.

33) Tiah Peterson worked as a waitress for Respondents during the period Thompson worked there. At the time of hearing, Peterson was still employed by Jack. She worked with Thompson during at least one shift. Because it was Pendleton Roundup time when Complainant Thompson worked for Respondents, the cafe was very busy. Peterson could not see Thompson at all times in the cafe. She never saw Ray touch Thompson, or heard him make any sexual comments to her. Peterson did not see Ray or Jack touch or make sexual comments to any waitress. While she worked, she bumped into both Jack and Ray, and thought they had touched her breasts. She did not think it was deliberate. She tried to stay away from Ray because she did not like him.

34) On September 17, 1987, Ray began grabbing Thompson's hand when she put the order tickets up in the window to the kitchen. She told Ray to stop, but he did not. During that day, Ray touched Thompson's breast with his elbow and with his hand. While she sat at the break table, Ray knelt next to her and leaned forward toward her. As she stood by a counter, Ray slid his hand twice across her buttocks. When she told him to stop, Ray laughed and went to the kitchen. Because of Ray's actions, Thompson began to keep notes about what occurred at work.

35) On September 18, 1987, Ray continued the same kinds of touching of Complainant Thompson. He touched her buttocks, breasts, and hands between 10 and 20 times. He touched her when he came out of the kitchen to get a soft drink as she was doing her side-work. Ray asked Thompson if she wanted to go to the Red Lion Motel. She declined. She felt that the request was sexually offensive because of the previous touching, and she knew that Ray was married. Ray laughed, and said, "later, maybe later." Thompson was told by other waitresses that Ray touched them.

36) Thompson told her parents and sister about what was happening at work. Her sister suggested that

Thompson wear a fake engagement ring to work, which she did. When she got to work on September 19, 1987, Thompson told the other waitress (Jamie Wilson), as Ray came out of the kitchen, that she was engaged. Ray became angry and threw things. About five minutes later, Ray changed Thompson's schedule for the next day so that Thompson would come in two hours earlier, before the cafe opened, when she would work alone with Ray. At the end of the lunch shift, Thompson quit because she was afraid of Ray, and feared that he would rape or kill her. When she left, Thompson said that she would not be back and she did not return for the dinner part of her shift.

37) Thompson did not complain to Jack about Ray.

38) On September 20, 1987, Jack and Jamie Wilson called Thompson to find out if she had quit, and she told Wilson that she had.

39) Complainant Thompson found Ray's touching her to be offensive and unwelcome. He did not stop touching her after she told him to. It affected how she did her job. Ray once touched her in front of customers, who later talked with Thompson about it. She found the working conditions intolerable because of the sexual harassment. She did not believe the situation would ever change, so she "wanted out."

40) Thompson called the police and filled out a police complaint against Ray. When the police checked up on her complaint, they were told that Ray had gone back to China.

41) Thompson was afraid to pick up her pay check. She later received her check from one of the waitresses.

42) During her employment with Respondents, Complainant Thompson was paid $3.35 per hour, plus tips. She earned between $15 and $20 per day in tips. Because the period of her employment was during the Pendleton Roundup, the cafe was busier than normal, and the total of her tips each day was higher than normal. In total, she worked 16.5 hours for Respondents, and earned $55.28 (gross), plus tips.

43) While she was employed by Respondents, she was also employed, on an on-call basis, for the Juvenile Department in Pendleton. Around two to three weeks after she quit work at the cafe, she was called into work by the Juvenile Department. In those weeks when she was called in, she worked part time, eight to 24 hours per week, at $6.85 per hour.

44) Complainant Thompson worked for Albertson's Bakery from January 30, 1988, to May 19, 1988, earning $3.35 per hour and averaging 16 hours per week during that period of employment.

45) She did not seek employment at another restaurant in Pendleton because she was afraid of working for a male owner or manager. Thompson moved to Salem, Oregon, in June or July to seek employment opportunities.

46) Complainant Thompson worked for The Other Place, a restaurant in Salem, on a full-time basis earning $3.35 per hour plus $20 to $40 per day in tips.

47) When she returned to Pendleton, Complainant Thompson took a job for Mainstream Drug and Alcohol Center, where she worked for a woman.

48) Thompson was subjected to sexual abuse at home by her mother's boy friend. She was first sexually abused at around age three, and then it was "off and on" until age seven. The abuse by her mother's boy friend started again when she was age 13, and continued until she was taken in by Children's Services Division when she was almost age 16.

49) Complainant Thompson started taking jobs when she was 15 or 16 years old. Prior to working at the cafe, Thompson considered the workplace "the only safe place for me," because she had never had problems with sexual harassment there. She had worked for both men and women. She was 18 years old when she worked for Respondents. Since working for Respondents, she refuses to work for a man due to fear of sexual harassment.

50) A couple of weeks after Thompson quit working for Respondents, she started going to the Mental Health Division, to Dr. Diehl, and to other doctors for counseling "for my own state of mind." She had not seen a counselor for about two years before she worked for Respondents. She returned to counseling because, on the third day that she worked for Respondents, "the nightmares started again." The nightmares were about the sexual abuse that she had experienced at home when she was younger; specifically, she had nightmares that she was being chased around and raped by her mother's boy friends. Those nightmares had stopped when she was about age 16. After her employment with Respondents, Thompson saw a counselor with the Mental Health Division for two months. She saw Dr. Diehl for stomach ulcers resulting from stress. She did not have ulcers before she worked for Respondents. At the time of the hearing, Thompson still had nightmares nightly, but was not in counseling or on medication. She has problems with doctors touching her, which was not a problem before she worked for Respondents. Her problem with being touched caused problems in her relationship with her fiancé.

51) Complainant Thompson suffered embarrassment due to her experiences at Respondents' cafe. She suffered fear and anxiety while she worked with Ray. She was embarrassed to list Lee's Cafe on job applications because she did not want to tell them why she quit. She did not receive three jobs with the state because she was required to but did not provide written reasons for leaving previous employers, and would not divulge the reasons why she left Lee's Cafe. The three jobs were at the Eastern Oregon Correctional Institution, Hillcrest School of Oregon, and Fairview Training Center.

52) Jennifer Fenton worked as a waitress for Respondents during the summer and early fall of 1986. She did not work with either Complainant. Ray once touched her on the buttocks. She told him to stop and he did.

53) Teri Kellas worked as a waitress for Respondents before either Complainant worked there. Due to a pregnancy leave, Kellas never worked

with either Complainant. Kellas never saw Ray touch waitresses, and never heard him make sexual comments to waitresses. She did not get along with Ray, and avoided speaking with him. She knew the other waitresses complained about Ray. At the time of hearing, she was employed by Jack. She agreed to go back to work for Jack after she learned that Ray had left the Business.

54) Kippie Pfingsten worked for Respondents as a waitress, but never worked with Complainants. After she had worked for Respondents about one month, Ray began touching her nearly every day she worked. When Pfingsten came to the cafe for her shift, Raymond would unlock the back door and, as Pfingsten came in, he would stick his elbow or hand out and touch her breast. She thought the touching was accidental until she talked to waitresses Janet Robinson and Lisa (Neilson) Patterson, who told her that Ray had touched each of them. When Pfingsten went into the bathroom, Ray sometimes would follow her in and turn on a heater. Although there was enough room in the bathroom for two people, Ray would always make physical contact with her. On one occasion when she and Ray were alone in the cafe and there were no customers, Ray unfastened his pants and laid his penis on a counter and said, "this is what you do to me." He did not have an erection. Pfingsten threatened to cut off Ray's penis with a cleaver, after which he put his penis in his pants. After that, Ray was very slow filling Pfingsten's food orders, or he would not cook the orders properly or would give small portions of food. This affected her tips. Pfingsten quit two weeks later because she thought her payroll check was short, and she had had enough of Ray's "abuse."

55) Kippie Pfingsten told other waitresses that Ray had exposed himself to her, and as a result she would not work with him.

56) Gloria Wallace worked as a waitress for Respondents, and was still employed by Jack at the time of hearing. She had worked part time at Lee's Cafe "off and on" for eight years. She did not work with Complainant Gray. Wallace was considered by some waitresses to be the "head waitress," and they would take their problems to her. Wallace never saw Ray touch, nor heard Ray make sexual comments to, any waitress. Some of the waitresses made complaints to Wallace, but she could not recall what the complaints were about. She heard one waitress comment that "he didn't move; he just wanted to feel my body against him." Janet Robinson once complained to Wallace about the treatment she was receiving, and Wallace advised her that she did not need to put up with it, that she could "press charges against them." Wallace could not recall what Robinson's complaint was about.

57) Ray often touched Carrie Wilson, who worked as a waitress. He rubbed up against her and touched her breasts. He once grabbed her buttocks, and was not trying to move her aside. Ray would sit next to her at a table during breaks, and touch one of her legs. He touched Wilson every two to three days. She found it offensive when he touched her. She tried to stop him, first verbally and later physically by punching him. After she hit him, he would be angry for a couple of weeks and would not put up her orders. Wilson would have to go into the kitchen to get the food, and the delay caused her customers to be angry. After a couple of weeks, the touching would resume. Ray showed his erection through his pants to Wilson. Wilson heard that Ray showed his erection to Janet Robinson and Lisa Patterson. Wilson saw Ray touch Janet Robinson on the breasts, stomach, and buttocks. Janet told Wilson that it bothered her when Ray touched her. While Wilson worked for Respondents, Ray made most of his sexual advances toward Complainant Gray and Robinson. Ray once said to Wilson, as she was balancing her checkbook, that "me can make your account big – grow." He told her "me better than your boy friend," and once asked her, "you go to motel with me?" Because of Ray's attitude, Wilson believed the remarks were sexual. Wilson quit working for Lee's Cafe because she was tired of the sexual harassment and of Ray's refusal to put up her orders. She believed the working conditions were intolerable because of the sexual harassment.

58) Most waitresses liked Jack, and held no hard feelings against him. No waitress was touched by Jack in a sexually offensive or unwelcome way. Jack never made any sexually offensive or suggestive comments to the waitresses. Several waitresses who testified that Ray had sexually harassed them expressed regret that Jack might be legally liable for Ray's acts. In that respect, the witnesses' possible bias in favor of Jack enhanced their credibility, because they recognized that their testimony could hurt him.

59) Respondent Ling Man Chan's (Ray's) testimony was not credible. He denied deliberately touching the waitresses in an offensive way, and denied making all but one comment attributed to him by other witnesses. According to Chan, the comment that "me better than your boy friend," was made as a joke, and he did not know what it meant. Chan's testimony was contradicted and so greatly outweighed by other credible evidence on the whole record that his testimony was not believable. Accordingly, Chan's testimony was given little weight whenever it conflicted with other credible evidence on the record, and the Forum declined to believe much of his uncontradicted testimony.

60) Complainant Gray's testimony was credible. Although she had some problems with memory, and with time frames and physical measurements, the Hearings Referee observed her demeanor and found it to be forthright and direct. Her answers were consistent with the testimony of the other credible witnesses as well as the documentary evidence.

61) Monica Jenkins' testimony was not credible. Her memory was poor. Her testimony was evasive and contained conflicting statements on important facts. For example, at one point she testified that she saw Ray rub against waitresses, and later she testified that she never saw Ray rub up against anybody. Her testimony varied substantially from the information she gave to the Agency during the investigation. She admitted making untruthful statements to the Agency, and

revealed a bias in favor of Respondents, stating that she did not wish to testify against Jack. She stated that it bothered her that Jack could be held liable for the acts of Ray. Accordingly, Jenkins' testimony was given little weight whenever it conflicted with other credible evidence on the record, and the Forum declined to believe much of her uncontradicted testimony.

62) Lisa Patterson's testimony was not credible. Her testimony at hearing was inconsistent with statements she made to the Agency during the investigation, and with statements attributed to her by credible witnesses. She revealed a bias in favor of Jack, stating that she thought Jack was a very nice man, and that when she gave her statement to the Agency she did not know that Jack could be held liable for Ray's actions. She also revealed a bias against Ray, who had fired her while Jack was in the hospital. Jack later asked her to come back to work. Patterson also demonstrated a bias against Complainant Gray. For these reasons, her testimony was found to be unreliable and was given little weight whenever it conflicted with other credible evidence on the record. In addition, the Forum declined to believe much of her uncontradicted testimony.

63) Two witnesses interviewed by the Agency during the investigation did not testify at the hearing. The Agency's interview forms were admitted into the record, but the Forum chose not to consider that evidence in reaching the Findings of Fact.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Lee's Cafe was an eating and drinking establishment in Pendleton, Oregon, under an assumed business name, owned and operated jointly by Ling Man Chan and Man-Sing-So, who were employers in the State of Oregon with one or more employees subject to the provisions of ORS 659.010 to 659.435.

2) Complainant Gray was employed by Lee's Cafe.

3) Complainant Gray is a female.

4) Respondent Ling Man Chan engaged in a course of verbal and physical conduct of a sexual nature toward Complainant Gray while she worked at Respondents' cafe.

5) Respondent Chan's conduct was directed toward Complainant Gray because of her gender.

6) Respondent Chan's conduct was offensive and unwelcome to Complainant Gray.

7) Respondent Chan's conduct had the effect of unreasonably interfering with Complainant Gray's work performance, and of creating an intimidating, hostile, and offensive working environment.

8) Complainant Gray rejected Respondent Chan's unreasonable interference with her work performance.

9) Following Complainant Gray's rejection, Respondent Chan terminated Complainant's employment with Respondents.

10) Complainant Gray's job with Kopper Kitchen was an equivalent or superior job, in terms of wages and hours, to her job with Respondents.

11) Complainant Gray suffered embarrassment, humiliation, and distress because of Respondent Chan's conduct and his termination of her employment with Respondents.

12) Complainant Thompson was employed by Lee's Cafe.

13) Complainant Thompson is a female.

14) Respondent Ling Man Chan engaged in a course of verbal and physical conduct of a sexual nature toward Complainant Thompson while she worked at Respondents' cafe.

15) Respondent Chan's conduct was directed toward Complainant Thompson because of her gender.

16) Respondent Chan's conduct was offensive and unwelcome to Complainant Thompson.

17) Respondent Chan's conduct had the effect of unreasonably interfering with Complainant Thompson's work performance, and of creating an intimidating, hostile, and offensive working environment.

18) Respondent Chan's conduct that created the intimidating, hostile, and offensive working environment was deliberate.

19) Respondent Chan's conduct created a working environment that a reasonable person would have found intolerable.

20) Complainant Thompson was forced to involuntarily resign her employment with Respondents because of the intolerable working environment created by Respondent Chan's conduct.

21) Complainant Thompson worked for Respondents for 3.5 days, and a total of 16.5 hours. That equals an average of 4.7 hours per day. During the week that Complainant worked, she was scheduled to work at least five days – September 16 to 20. Thus, in an average five day work week, she would have earned $78.73 per week (4.7 hours per day multiplied by five days equals 23.5 hours per week, multiplied by $3.35 per hour). In addition, she would have earned tips of approximately $15 per day, for an additional $75 per week. In total, she lost $153.73 per week in wages due to her discharge ($78.73 plus $75). Complainant Thompson worked for the Juvenile Department during and after the time she worked for Respondents. The amount of time that she worked for the Juvenile Department after April 20, 1988, would not have been less if she had continued working for Respondents. During her employment for Albertson's bakery, she earned an average of $53.60 per week (16 hours per week multiplied by $3.35 per hour). She worked at Albertson's about 16 weeks, for total earnings of $857.60 ($53.60 multiplied by 16 weeks). In June or July 1988, Complainant Thompson moved to Salem, Oregon, where she took a job at The Other Place. She earned $3.35 per hour, plus tips of $20 to $40 per day. She worked full time. Her employment at The Other Place was an equivalent or superior job to her employment with Respondents. Based upon the slim evidence on the record regarding when she could have begun working at The Other Place, the Forum infers that she began on or around July 1, 1988. In the 40 weeks between September 20, 1987, and July 1, 1988, Complainant lost $6149.20 in wages from Respondents ($153.73 multiplied by 40 weeks). She received $857.60 in interim earnings. Thus, her lost

wages equal $5291.60 ($6149.20 minus $857.60).

22) Complainant Thompson suffered embarrassment, distress, and renewed fear and stress as a result of Respondent Chan's conduct and her involuntary resignation of her employment with Respondents. In addition, she acquired a revulsion to working for men, and became and is uncomfortable when men touch her, including her doctor and her fiancé.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents were employers subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) The actions, inactions, and knowledge of Respondent Ling Man Chan, a co-owner, operator, and agent of Lee's Cafe with Man-Sing-So, are properly imputed to Respondent Man-Sing-So.

4) ORS 652.030(1) provides:

"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 to 659.435, it is an unlawful employment practice:

"(a) For an employer, because of an individual's * * * sex, * * * to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

"(b) For an employer, because of an individual's * * * sex, * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"* * *

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

OAR 839-07-555(1) provides:

"An employer * * * is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether:

"(a) The specific acts complained of were authorized by the employer; or

"(b) The specific acts complained of were forbidden by the employer; or

"(c) The employer knew or should have known of the occurrence of the specific acts complained of."

Respondent Man-Sing-So and Respondent Ling Man Chan violated ORS 659.030(1)(a) and (b) in regard to both Complainant Gray and Complainant Thompson.

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

Complainant Gray

The Specific Charges in Case Number 19-89 alleged two unlawful employment practices. First, it alleged that Respondents violated ORS 659.030(1)(b) by engaging in unwelcome conduct because of Complainant's sex. That conduct created "a hostile and abusive environment," which discriminated against Complainant Gray in the terms and conditions of her employment. Second, it alleged that Respondents violated ORS 659.030(1)(a) by terminating her employment with Respondents because she refused to engage in a sexually offensive act with Respondent (Chan).

A. Alleged violation of ORS 659.030(1)(b)

Based on the great weight of credible evidence in the whole record, it is clear to the Forum that Ray (Respondent Chan) engaged in a course of sexually offensive conduct with Complainant Gray, which created an intimidating, hostile, and offensive working environment.

Respondents asserted that there was a kind of group hysteria gripping the waitresses, caused by gossip and hearsay about Ray's conduct. That characterization of the testimony fails because many of the witnesses did not know each other and had never worked together. Indeed, several of the waitresses testified to personally experiencing the same kind of offensive sexual conduct by Ray as Complainants experienced. They included waitresses who never worked with Complainants. Nearly all of the witnesses testified that Ray's sexually offensive behavior was common knowledge at the cafe. Respondents attempted to challenge the credibility of the witnesses who testified to such conduct; however, the witnesses' stories were similar and consistent regarding Ray's treatment of each of them. The Forum found no reason to disbelieve them, and Respondents suggested no reason why they would concoct such stories, which would be harmful to Respondents. To the contrary, as noted in Finding of Fact number 53, several witnesses expressed regret that their testimony might harm Jack (Respondent Man-Sing-So). Although some witnesses never witnessed Ray's sexually offensive conduct and never were the subject of such conduct, those facts do not diminish the experiences of the other witnesses. Ray focused his attention on some waitresses and not others. He

often engaged in the sexual conduct when he was alone with a waitress or would not be noticed by others.

Regarding witness credibility, this Forum has previously observed "[t]hat a witness false in one part of the testimony of the witness is to be distrusted in others," quoting from ORS 10.095(3). *In the Matter of Sheila Wood,* 5 BOLI 240, 252 (1986). The Forum applied that principle to all witnesses in this case, including, notably, the witnesses about whom the Forum made credibility findings.

B. Alleged violation of ORS 659.030(1)(a)

The Forum found the events leading up to Complainant Gray's discharge as described in Findings of Fact numbers 16 to 20. What these facts show is a continuation and result of the hostile environment created by Ray's sexually offensive conduct and Gray's reaction to it. Gray had consistently rejected Ray's sexually offensive conduct, and told him to stop it. Three days before Gray was fired, she reacted to Ray's sexually offensive comment by leaving the cafe when her fiancé arrived. Sometimes, Ray's response to a waitress's rejection was to become angry and deliberately botch an order, or cook it late, or refuse to put the order up for the waitress. Ray behaved this way toward Gray during the next two days, including the day she was fired. That night, the confrontation arose because Ray was not cooking Gray's order. His behavior was a direct result of Gray's earlier reaction to his offensive comment. When he yelled at her twice to "eat me," she threw her apron at him and he fired her. This termination was the direct result of the hostile environment Ray created with his sexually offensive conduct, and of his unreasonable interference with her work performance. Ray's statement "eat me" was not a sexual solicitation; it was another sexually offensive comment. Thus, Complainant was not fired because she rejected Respondent's sexual solicitation; rather, her termination was the direct result of Ray's sexual harassment of her, and thus Respondents violated ORS 659.030(1)(a).

At hearing, Respondents suggested that a bona fide occupational requirement (BFOR), pursuant to ORS 659.030(1)(a), permitted Complainant Gray's firing. They argued that there was a good cause for firing Complainant, due to her alleged laziness, her failure to do her side work, her arguing with other waitresses, and the till shortages. Respondents misunderstood the nature of a BFOR. A BFOR is an exception that provides that a discriminatory practice or policy is not an unlawful employment practice in those instances where an individual's protected class, sex for example, is a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business. For example, a BFOR might arise where an employer takes adverse action or excludes a female based on a rule that no females may work in a warehouse because the job involves lifting 100 pounds. That employer would have to show that all or substantially all females would be unable to safely and efficiently perform the job, that is, lift 100 pounds, if the employer is to successfully establish that sex is a BFOR. *See* OAR 839-05-025. What

Respondents here attempted to establish was that there were legitimate, non-discriminatory reasons for firing Complainant. As the Findings of Fact show, the evidence did not support Respondents' defense.

Complainant Thompson

The Specific Charges in Case Number 20-89 alleged two unlawful employment practices. First, they alleged that Respondents violated ORS 659.030(1)(b) by engaging in unwelcome conduct because of Complainant's sex. That conduct created "a hostile and abusive environment," which discriminated against Complainant Thompson in the terms and conditions of her employment. Second, they alleged that Respondents violated ORS 659.030(1)(a) by making Complainant's working conditions so intolerable that Complainant was forced to involuntarily resign her employment, which constitutes a constructive discharge.

C. Alleged violation of ORS 659.030(1)(b)

As with Complainant Gray, the great weight of credible evidence in the whole record makes it clear to the Forum that Ray engaged in a course of sexually offensive conduct with Complainant Thompson, which created an intimidating, hostile, and offensive working environment. The Forum's discussion in section A. of this opinion relating to the working environment applies equally with regard to Complainant Thompson.

D. Alleged violation of ORS 659.030(1)(a)

This Forum set forth the standard for constructive discharge *In the Matter of West Coast Truck Lines, Inc.,* 2 BOLI 192, 215-16 (1981), *aff'd without opinion, West Coast Truck Lines, Inc., v. Bureau of Labor & Industries,* 63 Or App 383, 665 P2d 882 (1983), wherein the Forum stated:

> "The general rule, which this forum adopts, is that 'if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge * * *' *Young v. Southwestern Savings and Loan Association,* 509 F2d 140, 144 (5th Cir 1975)."

In *In the Matter of Tim's Top Shop,* 6 BOLI 166, 187 (1987), this Forum stated:

> "that 'deliberately' does not mean that the employer's imposition of 'intolerable' working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term 'deliberately' refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer." (Emphasis in the original.)

In *West Coast Truck Lines, Inc., supra* at 215-16, the Forum ruled that:

> "To find a constructive discharge, this forum must be satisfied that 'working conditions * * * so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' caused the employee to resign and that the conditions were

imposed by the deliberate, or intentional, actions or policies of the employer. *Alicea Rosado v. Garcia Santiago,* 562 F2d 114, 119 (1st Cir 1977); *Calcote v. Texas Educational Foundation,* 578 F2d 95, 97-98; and EEOC Decision 272-2062 (June 22, 1972).

"* * *

"The final rule concerning constructive discharge is that if there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formally discharged the employee. *Young, supra,* 509 F2d at 144."

There was no evidence on the record that Ray's verbal and physical conduct was anything other than deliberate. That conduct created hostile and offensive working conditions for Complainant Thompson. The Forum is satisfied that the working conditions were so difficult or unpleasant that a reasonable person in Complainant Thompson's shoes would have felt compelled to resign. The evidence showed that another waitress who was the subject of Ray's offensive conduct had resigned because of it. The evidence was undisputed that Ray's conduct was the cause of Complainant's resignation.

Therefore, Ray's deliberate imposition of intolerable working conditions on Complainant Thompson and her resulting resignation, as described in the Findings of Fact, constitute a constructive discharge, and Respondents violated ORS 659.030(1)(a).

Damages

The purpose of back pay awards in employment discrimination matters is to compensate a complainant for the loss of wages and benefits which the complainant would have received but for the respondent's unlawful discrimination. Such awards are calculated to make the complainant whole for injuries suffered because of the discrimination. *In the Matter of K-Mart Corporation,* 3 BOLI 194, 202 (1982).

In determining back pay awards, the equitable principle of setoff applies. This Forum has previously applied this principle as codified in federal law:

> "'Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.' Title VII of the Civil Rights Act of 1964, as amended, Section 706(g)." *In the Matter of the City of Portland,* 6 BOLI 203, 210 (1987).

This principle of law denies a complainant a recovery for harm he or she might reasonable have avoided. In other words, it relieves the respondent of liability for any losses that the complainant could reasonably have avoided. *City of Portland, supra,* at 210.

Pursuant to OAR 839-30-105(10), Respondents had the burden of showing that Complainants failed to mitigate their damages. *See also In the Matter of Lucille's Hair Care,* 3 BOLI 286, 302, (1983), *aff'd, Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).

Complainant Gray did not seek alternative employment for around two months after her discharge from Respondents' cafe. For that period, Complainant is not entitled to back pay because she voluntarily excluded herself from the job market, and thus failed to mitigate her damages. The evidence shows that when she sought work, she obtained it. *See* Finding of Fact 26. She was employed by Kopper Kitchen for 30 hours per week, at $3.35 per hour, plus tips. That job was the equivalent of or superior to her employment at Lee's Cafe, with respect to hours and wages. In addition, she obtained a job at Nova Enterprises for up to 20 hours per week, at $4.37 per hour. She voluntarily quit both jobs. The period for measuring back pay terminates when a complainant obtains a job with comparable or higher pay, and it does not resume when the complainant voluntarily quits the new job. *In the Matter of Pacific Motor Trucking Company,* 3 BOLI 100, 115 (1982), *aff'd, Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446 (1983), *rev den* 295 Or 773 (1983). Accordingly, Complainant Gray recovers no back pay.

Complainant Thompson had a second job with the Juvenile Department while she was employed by Respondents. Respondents failed to show that any wages from the second job earned after her discharge from the cafe would not have been earned if she had not been discharged. Thus, any wages earned at the Juvenile Department do not reduce her back pay award. Respondents failed to show any evidence that Complainant did not seek alternative equivalent employment. There was evidence that she did not seek restaurant work, but that fact alone does not establish that she failed to mitigate her damages. Alternative equivalent employment does not have to be in the same occupation. Absent specialized training or a great deal of experience in a field, any alternative job with equivalent wages and benefits should be sought.

On January 30, 1988, Complainant Thompson took a job with Albertson's Bakery. She earned the minimum wage of $3.35 per hour, and worked an average of 16 hours per week. Because she was paid less at Albertson's than at Lee's Cafe (due to the absence of tips at Albertson's), and worked fewer hours at Albertson's than at Lee's Cafe, her job with Albertson's was not an equivalent job to the one she lost with Lee's Cafe. Thus, the job at Albertson's did not cut off the period for measuring Complainant Thompson's back wages, but her earnings at Albertson's are set off against the back pay award. In June or July 1988, she moved to Salem to seek job opportunities. She got a job at The Other Place around July 1, 1988. She earned $3.35 per hour plus tips of $20 to $40 per day. She worked full time. That job was superior to the one she had at Lee's Cafe, and therefore, it cut off the period for measuring her back pay.

Awards for mental suffering depend on the facts presented by each Complainant. Respondents must take complainants as they find them. Here, the Forum found that Complainant Gray suffered embarrassment and humiliation as described in Finding of Fact number 27. During the period of her employment, she was, almost daily, repeatedly subjected to Ray's sexually offensive conduct. That

conduct was a direct cause of her discharge, and the cause of some difficulty for her working for men after working at Lee's Cafe.

The Forum found that Complainant Thompson experienced mental suffering due to her experiences at Lee's Cafe, as described in Findings of Fact numbers 48 to 51. Before Complainant Thompson went to work for Respondents, she had a history of sexual abuse at home. Her place of employment had been a safe place for her. She had stopped receiving counseling for the sexual abuse. Due to the sexual harassment she suffered at Respondents' cafe, Complainant Thompson's past sexual abuse was resurrected in addition to the mental suffering she experienced due to Ray's offensive conduct. She was upset enough by Ray's conduct that, on her second day of work, she began to keep notes about it. *Compare In the Matter of Stop Inn Drive In*, 7 BOLI 97, 115 (1988). She suffered both mentally and physically from that conduct, and received counseling and medical treatment. She began and continues to have difficulty, in both her public and private life, working with men and being touched by men. Although the degree of her difficulties was affected by the sexual abuse she suffered when she was younger, the harassment she suffered at Lee's Cafe caused her to have increased and additional difficulties, for which Respondents are directly liable.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondents are hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Sheri C. Gray, in the amount of:

a) THREE THOUSAND DOLLARS ($3000.00), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; PLUS,

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Paula Thompson, in the amount of:

a) FIVE THOUSAND TWO HUNDRED NINETY ONE DOLLARS AND SIXTY CENTS ($5291.60), representing wages Complainant lost as a result of Respondents' unlawful practice found herein; PLUS,

b) THREE HUNDRED FIFTY SEVEN DOLLARS AND FIFTY ONE CENTS ($357.51), representing interest on the lost wages at the annual rate of nine percent accrued between July 1, 1988, and March 31, 1989, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between April 1, 1989, and the date Respondents comply herewith, to be computed and compounded annually; PLUS,

d) SIX THOUSAND DOLLARS ($6000.00), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

3) Cease and desist from discriminating against any current or future employee because of the employee's sex.

In the Matter of
DANIEL DURON,
dba Daniel Duron Co., Respondent.

Case Number 27-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 16, 1989.

SYNOPSIS

Respondent roofing contractor did not discriminate against Complainant on the basis of the employee's opposition to an unsafe or unhealthy workplace because, with the safeguards Respondent furnished and with the safety practices followed, the wet condition of the roof, in the judgment of a reasonable person, did not make the workplace or the performance of the assigned tasks unsafe or unhealthy. Complainant's opposition to working in the rain did not constitute opposition to any practice forbidden by the Oregon Safe Employment Act, and he did not become a member of a protected class. The Commissioner found that Respondent made the decision to discharge Complainant before Complainant opposed working in the rain, and in any event the discharge could not have been because of protected class membership. ORS 654.010, 654.015, 654.062(5); OAR 839-06-020(1), 839-06-020(5).

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 22, 1989, in Room 311 of the State Office Building, at 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Linda Lohr, an employee of the Agency. Michael Barngrover (hereinafter Complainant) was present throughout the hearing. He was advised by David Degner, Attorney at Law. Daniel Duron (hereinafter Respondent) was present throughout the hearing. He was represented by John Rodgers, Attorney at Law.

The Agency called the following witnesses: Michael Barngrover, Complainant; Richard Loudd, Senior Investigator, Civil Rights Division of the

Agency; and Joseph Tam, Investigative Team Manager, Civil Rights Division of the Agency. Respondent called the following witnesses: Daniel Duron, Respondent; and Darrell Reese, a former employee of Respondent.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about May 19, 1988, Complainant Michael J. Barngrover filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he was the victim of the unlawful employment practice of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice, under ORS 654.062(5), by Respondent.

3) The Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On February 1, 1989, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent had discharged Complainant from employment because Complainant opposed unsafe practices and working conditions. The Specific Charges alleged that Respondent's action violated ORS 654.062 (5)(a).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On February 6, 1989, Respondent filed an answer in which he denied the allegation mentioned above in the Specific Charges.

7) On February 23, 1989, Attorney David C. Degner notified the Forum that he had been retained by Complainant as his advisor, pursuant to OAR 839-30-058.

8) On February 28, 1989, the Hearings Referee sent to Mr. Degner a letter stating that, from the Forum's file, Complainant had been sent copies of all documents that had been sent to Respondent.

9) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case. In addition, on March 16, 1989, the Agency filed an amendment to its Summary. Although required to do so by OAR 839-30-071, Respondent did not submit a Summary of the Case. Respondent submitted a Memorandum of Law on the day of hearing.

10) A pre-hearing conference was held on March 22, 1989, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings. Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing.

11) At the start of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

12) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) On April 7, 1989, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing. Pursuant to OAR 839-30-165, the Agency and Respondent had 10 days to file exceptions to the Proposed Order. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) At all times material herein Respondent Daniel Duron was the owner of and doing business as Daniel Duron Co., engaged in the roofing and siding business, and was an employer in the State of Oregon utilizing the personal services of one or more employees, subject to the provisions of ORS 659.010 to 659.435 and ORS 654.001 to 654.295 and 654.750 to 654.780.

2) Complainant was employed by Respondent as a roofer between April 15, 1988, and April 29, 1988.

3) Complainant's duties included tearing off roofs, laying felt, cleaning up, and carrying materials, such as tools, nails, felt, shingles, and lumber. Complainant's rate of pay was $5.00 per hour, and he usually worked eight or nine hours per day.

4) During the period of his employment, Complainant worked with: Respondent; Brad French, who was Respondent's foreman; Darrell Reese, who had worked for Respondent for about one year; Richard Ridgeway; and Ken Dixon.

5) Complainant had around eight years of experience as a roofer. He had received safety training during those years of work. He knew how to secure a ladder, and how to install and use toeboards to walk on when working on steeply sloped roofs. He believed that, if toeboards were used, a sloped roof, even if wet, was not dangerous. Before working for Respondent, Complainant worked as a roofer in the state of California; in Roseburg, Oregon; and for Bob Carlson Roofing in Hillsboro, Oregon, putting on composition shingles. Respondent knew that Complainant had at least one year of experience working for Bob Carlson Roofing.

6) Complainant had experience doing roofing work in the rain and on steep roofs.

7) In Oregon, it is standard industry practice to put on roofs in the rain. Steep roofs are common. Working in the rain is not unsafe if precautions are taken, such as installing toeboards and tying off ladders.

8) Respondent regularly discussed safety matters with his employees, both before and during jobs. Often, Respondent and his employees would meet in the morning before starting work and discuss the work for that day, including safety matters.

They discussed matters such as the pitch of the roof, how and whether to use toeboards, and how to tie off ladders.

9) Complainant worked on three jobs during his employment with Respondent. He arrived late for work on several occasions.

10) The first job was in Forest Grove. Respondent had to discipline Complainant because of his obscenities, which Respondent felt were continuous, excessive, and "exceptionally vulgar," even for construction workers. On one occasion, Complainant's obscenities were directed to a woman walking near the job site. Respondent had received complaints from his clients about the obscenity. During the clean up phase, Respondent threatened to fire Complainant because Complainant repeatedly made personally insulting comments to Respondent in front of the other workers. Complainant apologized.

11) The second job was in Hillsboro. Complainant twice failed to follow Respondent's instructions to tie off an access ladder to a staging plank, which was used for a steep roof. Complainant said he did not see the need to tie off the access ladder. Respondent had to tie off the ladder himself. Respondent was angry at Complainant because he was slow, in that he took about two hours to install one roll of shakeliner felt, which is tar paper, on the roof.

12) At around 7 a.m. on April 29, 1988, Complainant was supposed to meet Reese and Respondent at Respondent's house in order to catch a ride in Respondent's truck to the third job. Complainant did not show up at the appointed time. Reese and Respondent waited about one hour, then drove to find Complainant's house. They did not find Complainant, and drove to the job site. Respondent and Reese talked about the job and the pitch of the roof as they drove to the job. They got there around 9 a.m. Respondent was angry at Complainant because he did not know where Complainant was. Later, Complainant called Respondent from Respondent's house and asked where the job site was. Respondent considered firing Complainant at that point, but he needed the help to finish the job so he gave Complainant directions to the site. Complainant hitchhiked to the job, and arrived sometime around 10:30 to 11 a.m. Respondent told him that Respondent did not like him showing up late for work.

13) Respondent's crew that day was made up of Respondent, Complainant, and Reese. They were working on a house with two levels, with sloped roofs and two levels with flat decks.

14) It was raining off-and-on at the job site on April 29. During a rain shower, Complainant complained to Respondent about working in the rain.

15) Complainant was moving shingles from the lower deck to the upper deck, by way of an inside stairway. Respondent had to ask Complainant several times to get 2 x 4s for toeboards. Later, Complainant was installing felt, and had to carry it up to where he was working. A six foot step ladder was standing on the upper deck, which was bare plywood, and was leaning against the sloping side edge of the roof. Complainant

approached the ladder from the uphill side of the roof, and as he started to climb down, the ladder slid downhill and Complainant fell to the deck. The ladder had not been secured by whoever had placed it there. It was standard practice for all ladders to be secured. A ladder could be properly secured, or "tied down," by using electrical wire or rope to tie it to a gutter, or by nailing in a 2 x 4 board to brace the ladder at the top or the bottom. Complainant told Respondent he had fallen off of the ladder. Respondent told Complainant to secure the ladder. Complainant pounded in a 16 penny nail, which is about 2 3/4 inches long, next to the ladder to stop it from sliding. Respondent was angry at Complainant for using the nail, which did not properly secure the ladder, and told Complainant to nail a 2 x 4 beside the top of the ladder to stop it from sliding sideways, and to nail a 2 x 4 to the deck at the bottom of the ladder so it could not slide out. Complainant grumbled as he secured the ladder. Respondent considered Complainant to be lazy because he did not want to get a 2 x 4 to secure the ladder, and thought Complainant was insubordinate and slow to follow orders. Respondent believed that Complainant's actions demonstrated Complainant's hostile attitude toward Respondent.

16) While Complainant was working on part of the roof with a low pitch slope, Respondent instructed him to bend the felt up and tack it to an abutting wall, in order to keep the rain from leaking into the house where the roof bordered the wall. Complainant did not follow Respondent's instructions.

17) Respondent made his decision to terminate Complainant that morning. Incidents that morning contributing to Respondent's decision included: Complainant's late arrival to work, his improper way of securing the ladder, his failure to follow instructions for installing the felt, and his slowness in getting 2 x 4s for toeboards. Those incidents added to earlier reasons Respondent had for terminating Complainant, including: Complainant's failure to follow instructions, his poor attitude, his late arrival several times to work, his slowness, and his obscenities. Respondent's main reason for terminating Complainant was his failure to follow instructions. Respondent did not believe the situation would get better. He decided to tell Complainant of the decision at the end of the day.

18) Respondent decided to break for lunch, due to a hard rain shower. Respondent, Complainant, and Reese drove to a nearby store for sandwiches, and Respondent lent Complainant $3 for lunch. During the lunch break, Respondent, Complainant, and Reese talked about the weather and how much more work they should do that day. None of them wanted to work in the rain. Respondent wanted to finish putting on the felt before they quit for the day because electricians were scheduled to work on the house the next day. Electricians are not allowed to work until the roof is on. Once the felt was on, the house would be dry enough for the electricians. Respondent, Complainant, and Reese agreed to go back and finish putting felt on the roof, which would take about an hour, and then quit work for the day. Neither Respondent nor Reese heard

Complainant complain about unsafe working conditions on this job. They had worked with him in the rain on other jobs and never heard him complain about unsafe working conditions on those jobs.

19) Respondent told Complainant and Reese to install felt and to use toeboards. Respondent believed that both Complainant and Reese knew how to use toeboards. Respondent and Complainant used toeboards on the roof that day. Reese had not installed toeboards because some were left on the roof by carpenters who had been there before. Reese believed it was his responsibility to install toeboards when he needed them. Reese felt it was safe to work on the roof, and never felt in danger. He did not believe it was too wet to work. Respondent had told him to wear shoes that had a good grip. He was wearing basketball-type court shoes.

20) At around 1:30 p.m., as Reese was getting some felt paper from the roof, he fell between 27 and 35 feet to the ground. He broke his wrist and suffered internal bruising. Reese thought that the reason he fell was because the carpenters' toeboards were too far up, about six feet from the bottom edge of the roof. He thought that he could reach them, but missed them when he fell.

21) Complainant did not see Reese fall. While Reese was lying on the ground, Complainant told him that it was Respondent's fault that he fell, because they had to work on the wet roof. Korlan Tosch, who was the general contractor on the job, heard Complainant blame Respondent for Reese's fall.

22) After Reese fell, Respondent used a mobile telephone in his truck to call for help. While Respondent was in his truck, Tosch told him that Complainant was blaming Respondent for Reese's fall. Respondent did not base his decision to terminate Complainant on what Tosch told him.

23) After Reese's fall, Respondent and Complainant quit work. Reese was taken to the hospital by Life Flight. Complainant rode back to Respondent's house with Respondent. On the way there, they discussed Reese's fall, and Respondent said that he felt responsible for Reese's fall. Respondent told Complainant that he had been thinking for a long time about Complainant's hostile attitude toward him, and that Complainant would be happier working for someone else. Complainant said "OK." Respondent considered the termination of employment to be by mutual agreement. When they arrived at Respondent's house, Complainant used Respondent's telephone while Respondent took a bath. Later, Respondent drove Complainant into Forest Grove before going to the hospital to visit Reese.

24) Respondent was credible. Despite several inconsistent statements and some memory loss, his demeanor impressed the Hearings Referee that he was believable. In addition, Respondent's testimony was corroborated by Reese's testimony, which was also found to be credible.

25) Complainant was not credible. The Hearings Referee observed his demeanor during the hearing, and did not find him genuine. His testimony was inconsistent and vague on many points. For example, he testified twice that Respondent never used toeboards, and later testified that he and Respondent both used toeboards. His testimony was not logically consistent. Although he claimed that he was slow because he was afraid, and complained that the steep roof was unsafe because of the rain, he also testified that working in the rain was not unsafe if toeboards are used. He said he knew how to and was using toeboards. In addition, he said that he had years of experience that included working in the rain and on steep roofs. Such testimony did not jibe with Complainant's alleged fear of unsafe conditions caused by the rain and the steep roof. His testimony on most important points was contradicted by that of Respondent and Reese, both of whom the Hearings Referee found to be credible. For example, he testified that Respondent never talked about safety procedures. Respondent and Reese testified that discussions about safety practices were routine. Because Complainant's testimony was not credible, it was given less weight whenever it conflicted with other credible evidence on the record. In some cases, his testimony was not believed even when it was not controverted by other evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a person who had one or more employees in the State of Oregon.

2) Complainant was employed by Respondent.

3) Complainant told Reese, a coworker, that Reese's fall from a roof was Respondent's fault because Respondent made him work on a roof wet with rain.

4) Complainant's claim that Reese's fall was Respondent's fault did not constitute opposition to any practice forbidden by the Oregon Safe Employment Act (OSEA). Rain on a sloped roof, in the judgment of a reasonable person, does not make the workplace or the performance of the assigned tasks, here carrying materials and installing felt, unsafe when workers use toeboards and secure ladders. Respondent instructed Complainant and Reese to use toeboards and to secure ladders, and he furnished the necessary materials for those safeguards.

5) Respondent discharged Complainant because he failed to follow instructions, came to work late, was slow, had a poor attitude, and used excessive obscenities.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and ORS 659.400 to 659.435.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) ORS 654.062(5)(a) provides:

> "It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because such employee has opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780 * * *."

Respondent did not violate ORS 654.062.

OPINION

The findings and conclusions in this case turn largely on the credibility of the Complainant, the Respondent, and Mr. Reese. As described in Findings of Fact numbers 24 and 25, the Forum found Respondent and Reese credible, but did not find Complainant credible.

Complainant testified that he made two complaints to Respondent about the rain making the plywood roofs slippery. While he may have complained about working in the rain, he also testified that a wet roof is not unsafe if the right precautions are taken, such as using toeboards. Respondent instructed his workers about safety practices. He told Complainant and Reese to use toeboards. Complainant was using toeboards, and had experience working in the rain and on steep roofs. Regarding securing the ladder, Complainant first improperly secured it, and then only grudgingly secured it after Respondent angrily ordered him to do so.

These facts make the Forum believe that Complainant was opposing working in wet weather, rather than opposing a safety hazard. His statement to Reese that Respondent was to blame for Reese's fall did not constitute opposition to any practice forbidden by the OSEA, since Respondent used reasonably necessary means to render the place of employment safe. He instructed his workers about safety practices, and told them to use such practices on April 29, the day Complainant allegedly complained.

ORS 654.010 requires every employer to furnish a safe place of employment and "do every other thing reasonably necessary to protect the life, safety and health of such employees." Here, Respondent was working with two workers who had experience and had received safety training. He furnished the materials necessary to safely perform the assigned tasks. He admitted that he could have supervised Reese more carefully. But on these facts the Forum declines to find that he acted unreasonably or that he failed to comply with ORS 654.010.

ORS 654.015 prohibits an employer from maintaining any place of employment that is unsafe or detrimental to health. Respondent did not perform any practice forbidden by ORS 654.015.

Two facts in particular made Respondent's action, that is, Complainant's termination, appear to be an unlawful employment practice. The first was that Reese fell off the wet roof and was injured, following Complainant's first alleged complaint to Respondent that it was too wet to work. By itself, that fact might indicate that the workplace was unsafe due to the rain. However, as found above in the Ultimate Findings of Fact, rain on a sloped roof does not make the workplace or the performance of the assigned tasks, here carrying materials and installing felt, unsafe when workers use toeboards and secure ladders. Respondent instructed Complainant and Reese to use toeboards and to secure ladders. Respondent and Complainant used toeboards. Complainant and Reese had experience as roofers, and had received instruction about safety

practices. Respondent furnished 2 x 4s and other necessary materials to Complainant and Reese for use as toeboards and for securing ladders. OAR 839-06-020(5) states:

> "ORS 654.062(5) protects employees who oppose 'any practice forbidden by' OSEA. 'Any practice forbidden by' OSEA is not limited to practices specifically forbidden by OSEA or the rules promulgated under OSEA by the Accident Prevention Division. It includes opposition to any condition which, in the judgment of a reasonable person, makes the workplace or the performance of assigned tasks unsafe or unhealthy. However, those conditions which are unsafe or unhealthy only because of unique individual fears or limitations are not forbidden by OSEA."

Here, Respondent furnished the safeguards, and adopted practices as were reasonably necessary to render the place of employment safe. Reese's accident occurred because he failed to follow Respondent's instructions to use the furnished safeguards. There was no evidence that Respondent knew or should have known that Reese was not following instructions. The Forum does not find that Respondent acted unreasonably. With the safeguards furnished and the safety practices followed, the wet condition of the roof, in the judgment of a reasonable person, did not make the workplace or the performance of assigned tasks unsafe or unhealthy. Complainant, Respondent, and Reese so testified. Thus, Complainant did not oppose any practice forbidden by the OSEA, and did not become a member of a protected class.

The second fact indicating that an unlawful employment practice had occurred was that Respondent terminated Complainant within a short time after Complainant blamed Respondent for Reese's fall. OAR 839-06-020(1) states:

> "ORS 654.062(5) prohibits discrimination against an employee because he/she 'opposed' health and safety hazards in the workplace. * * * [W]hat constitutes opposition covers a broad range of activities. For example, an employee may oppose health and safety hazards in a discussion with co-workers which is overheard by management[.] * * * The concern of ORS 654.062(5) is not with how the opposition is made but with the employer's reaction to the opposition."

Assuming that the wet roof had constituted an unsafe condition forbidden by the OSEA, Complainant's statement to Reese -- that it was Respondent's fault that he fell because he had to work on the wet roof -- could constitute opposition to health or safety hazards. After Respondent learned about Complainant's statement, if it played a key role in Respondent's decision to terminate Complainant, then Respondent would have committed an unlawful employment practice. The Forum found that Respondent decided to terminate Complainant before Complainant made the statement. *See* Finding of Fact 17. Respondent's testimony on this issue was troubling because it was inconsistent. At one point he testified that Complainant's

comment bothered him because he thought that Complainant should have talked with him before making the statement in front of other workers. Respondent then said that Complainant's statement was involved in his decision to terminate Complainant. He went on to assert that his decision to terminate Complainant had been made in the morning, and described his reasons for the decision. The Hearings Referee chose to believe Respondent's latter assertion because it was consistent with Respondent's other testimony about earlier considerations to terminate Complainant. Accordingly, Respondent's decision to terminate Complainant was not caused by Complainant's opposition to an unsafe working condition.

ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in the unlawful practice charged, the Specific Charges and the Complaint against the Respondent in this matter are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

PALOMINO CAFE AND LOUNGE, INC., Woon Y. Lee and Lucie B. Lee, Respondents.

Case No 03-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued June 23, 1989.

SYNOPSIS

Respondent Woon Lee sexually harassed Complainant. When the corporate Respondent was involuntarily dissolved, Woon Lee and Respondent Lucie Lee, who were the owners and operators of the restaurant and lounge, continued to operate the restaurant and lounge as coproprietors, and became successor employers of the corporation; as such, they became personally liable for Complainant's damages. The Commissioner awarded complainant mental suffering damages. ORS 60.651, 60.654, 183.415(6), 659.030(1)(b); OAR 839-05-010, 839-07-550, 839-07-555.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on November 22, 1988, in Room 240 of the State Office Building, 700 SE Emigrant Street, Pendleton, Oregon. Linda Lohr, Case Presenter for the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary

of the Case for the Agency, argued Agency policy, and examined the witnesses. The Palomino Cafe and Lounge, Inc., Woon Y. Lee, and Lucie B. Lee (hereinafter the Respondents), after being duly notified of the time and place of this hearing and of their obligation to file an answer within twenty (20) days of the issuance of the Specific Charges, failed to file an answer as required. The Hearings Referee found the Respondents in default. Nannette Hesse (hereinafter the Complainant) was present throughout the hearing.

The Agency called as witnesses the following: Pat Clark, an Investigative Supervisor with the Agency (by telephone); the Complainant; Marlene Fields, a former employee of Respondents (by telephone); Jeanette Parker, Complainant's co-worker (by telephone); Regina Shaeffer, Complainant's co-worker; Susan Moxley, an Investigator with the Agency; and, for the purpose of authenticating certain documents, Linda Lohr, Case Presenter for the Agency.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On November 17, 1986, the Complainant filed a verified complaint with the Civil Rights Division (CRD) of the Agency alleging that she was the victim of the unlawful employment practice of the Respondents.

2) After investigation and review, the CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding the Respondent in violation of ORS 659.030.

3) Pat Clark, an investigative supervisor for the Agency, approved the Administrative Determination prepared in this matter by the investigator, Susan Moxley, and subsequently initiated conciliation efforts between the Complainant and the Respondents. On September 17, 1987, Clark concluded that conciliation had failed and referred the case to the Agency's Quality Assurance Unit for further action.

4) On October 5, 1988, the Agency prepared and served on Respondents, and each of them, Specific Charges herein, alleging that the Respondent Woon Y. Lee had repeatedly engaged in a course of conduct during the Complainant's employment by Respondents designed to harass, intimidate, humiliate, and embarrass Complainant based on her female sex, creating a hostile and abusive environment, constituting discrimination based on sex in the terms and conditions of the Complainant's employment in violation of ORS 659.030(1)(b).

5) With the Specific Charges, the Forum served on the Respondents, and each of them, the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy

of the specific administrative rule regarding responsive pleadings.

6) On October 27, 1988, the Forum mailed to the Respondents, and each of them, a Notice of Intent to Default, which noted that no answer or other response had been received.

7) On November 3, 1988, the Forum received a letter from attorney Laurence Reu, Pendleton, postmarked November 1, 1988, and enclosing a Motion for Relief From Default, together with supporting affidavits of Mr. Reu and of Woon Y. Lee, one of the Respondents herein.

8) On November 3, 1988, the Forum denied the Motion For Relief and found the Respondents and each of them in default for failure to file a timely answer or other response; the Forum found specifically that the Respondents had failed to show good cause for relief from said default, and would therefore be precluded from presentation of evidence in the hearing in this matter.

9) Pursuant to OAR 839-30-071, on November 10, 1988, the Agency timely filed a Summary of the Case.

10) Neither the Respondents nor their representative attended the hearing of November 22, 1988.

11) Pursuant to ORS 183.415(7), the Agency and the Complainant were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) On the Hearings Referee's own motion, the record in this case was reopened on January 23, 1989, until February 7, 1989, for the Agency to obtain affidavit confirmation of lost wage information.

13) The Proposed Order in this matter was issued on April 24, 1989, and exceptions, if any, were to be received by May 4, 1989. Exceptions in this matter were not received on or before the expiration date.

FINDINGS OF FACT – THE MERITS

1) The Respondent Palomino Cafe and Lounge, Inc., was an Oregon corporation operating a bar and restaurant in Ontario, Oregon, and utilizing the personal service of one or more employees, and controlling the means by which such service was performed at times material herein.

2) The Respondents Woon Y. Lee and Lucie B. Lee were the owners and corporate officers (president and secretary, respectively) of said corporation, and at times material exercised sole operational control of the bar and restaurant in Ontario bearing the corporate name.

3) The Respondent Woon Y. Lee was the registered agent for service of the Respondent Palomino Cafe and Lounge, Inc.; he was also known as "Tony" Lee.

4) The Respondent "Tony" Lee, together with the Respondent Lucie B. Lee, were known as the owners of the Palomino, and were the direct supervisors of those persons working there at all times material herein.

5) The Complainant, female, learned from a friend that there might be an employment opportunity at the Respondents' establishment, and applied in person on or about July 15, 1986.

6) The Complainant was interviewed and hired by the Respondent "Tony" Lee on or about July 17, 1986; she was not required to submit any written application, and was not asked about her prior working experience.

7) The Complainant began working as a waitress at the Palomino; she worked part time, usually four days a week, two day shifts and two night shifts (until approximately 3:00 a.m.).

8) Respondent "Tony" Lee was the Complainant's direct supervisor; in his absence, Respondent Lucie Lee supervised the Complainant and her co-workers.

9) Beginning on her first day on the job, and continuing every day thereafter, Respondent "Tony" Lee placed his arms around the Complainant's waist from behind her, slapped her on the buttocks, untied her apron, and massaged her shoulders.

10) Less frequently, but on more than one occasion, Respondent "Tony" Lee placed his hands on the Complainant's hips from behind her and rotated her hips; she told him that it was difficult to work with someone all over her in that manner.

11) Throughout the Complainant's employment at the Palomino, Respondent "Tony" Lee continued to touch the Complainant's hands and shoulders as described, and frequently slapped her buttocks.

12) On occasion while touching the Complainant, Respondent "Tony" Lee would comment that she had a "nice rear-end."

13) On one occasion, Respondent "Tony" Lee commented that the Complainant's breasts were "nice."

14) At another time, Respondent "Tony" Lee commented to the Complainant and a co-worker concerning a tattoo on the Complainant's right breast; the Complainant believes that he was looking down her blouse as she bent over, as the tattoo is not otherwise visible.

15) None of the described touchings of the Complainant by Respondent "Tony" Lee were invited and each was unwelcome.

16) When the Complainant mentioned to her co-workers that she was being bothered "by him," she was told that the Respondent "Tony" Lee was like that to everybody (female) and that she must deal with it.

17) The Complainant said "It's not right," and was told by her co-workers "if you want to work here, you have to do it."

18) The Complainant became apprehensive about being touched all the time in an unwelcome manner; she attempted, not always successfully, not to be around Respondent "Tony" Lee; she tried not to walk past him, when possible.

19) The only times that the Complainant was comfortable at work was when Respondent "Tony" Lee was not there during her shift, or when he left during her shift; this happened about once a week.

20) Respondent "Tony" Lee's unwanted touching of the Complainant occurred in front of customers; the Complainant was not sure of the customers' reactions.

21) The situation made the Complainant very nervous and embarrassed; she was concerned that a

customer would see Respondent "Tony" Lee's actions toward her when she was not able to "turn around and hit him."

22) The Respondent "Tony" Lee asked the Complainant "out for drinks a lot" at closing time; she always turned him down.

23) As a result of the behavior of the Respondent "Tony" Lee, the Complainant became nervous, embarrassed, and scared; she couldn't pay attention to work and would forget things on orders.

24) The Complainant was scared by the Respondent "Tony" Lee's behavior because she didn't want to have to put up with it, but needed the job; "I had to think about what can I do about this?"

25) The Complainant "hated going to work" and enduring the unwelcome touching; on at least two occasions going home from work she was in tears over what she was going to do about her job conditions.

26) Jobs were not easy to get in Ontario at times material; because "there was no jobs anywhere," the Complainant was willing to work part time just to be able to work.

27) The Complainant talked to her sister about the situation at work; the sister advised her to quit, but the Complainant did not consider this an option because she needed the work.

28) Respondent "Tony" Lee's offensive behavior toward female employees generally did not occur in the presence of Respondent Lucie Lee; she was not usually present in the late evening.

29) Respondent "Tony" Lee "picked at" the younger, less experienced female employees; experienced, older female cooks and bartenders who were assertive in rejecting his behavior could avoid most of his touching.

30) Respondent Lucie Lee did not attempt to alter Respondent "Tony" Lee's behavior toward the female employees; she appeared to be aware of it, as she treated the younger waitresses more harshly.

31) At times material, other female employees of the Respondents were subjected to uninvited and unwanted touching by Respondent "Tony" Lee, including putting his arms around their shoulders, or their waists, and biting or patting, as well as untying aprons.

32) Respondent "Tony" Lee's daily unwelcome touching of the female employees made them all uncomfortable and was the subject of frequent discussions among the female employees.

33) The older female employees who protested Respondent "Tony" Lee's uninvited and unwanted touching were not fired because they were not as easily replaceable as the younger waitresses; the constant and repeated touching (one testified to "every day for five years") nonetheless made them uncomfortable.

34) Male employees of the Respondents were not subjected to touching, patting, around the shoulder or around the waist "hugs," or biting by the Respondent "Tony" Lee.

35) The Complainant and her boyfriend were looking for a new place to live in early August 1986.

36) Respondent "Tony" Lee offered the Complainant the use of an apartment he owned; he said there would be no rent and that the Complainant couldn't tell his wife.

37) The Complainant did not accept the offer of the apartment.

38) The Complainant's employment was terminated the following day; she testified that this upset her a great deal, as it seemed to be a continuation of the Respondent "Tony" Lee's offensive behavior.

39) Following the termination of her employment with Respondents, the Complainant didn't like to talk to her boyfriend about her experience at the Palomino because he would become upset at the treatment she received; she feared he might attempt to retaliate against Respondent "Tony" Lee.

40) Following the termination of her employment with the Respondents, the Complainant's upset about the unwanted touching continued; she thought about it a lot and it made her feel uncomfortable; by the time of the hearing, she still thought about it sometimes in that it might happen in connection with another job, and it would be hard for her to continue work if she were again treated in a like manner.

41) Respondent "Tony" Lee alleged at the time she was discharged that the termination was due to money missing from the till.

42) During the Agency's investigation, Respondent "Tony" Lee alleged that the Complainant was terminated because she spelled the items wrong on her orders to the kitchen and made it difficult for the cooks to read or understand; also, she allegedly served free soft drinks to her boyfriend.

43) The Complainant denied getting the orders wrong or being warned of this prior to her termination; she also denied serving free soft drinks to her boyfriend.

44) Other employees of the Respondents were unaware that any employee had ever been terminated for poor handwriting or giving soft drinks to a friend.

45) On February 19, 1986, the Palomino Cafe and Lounge, Inc., was involuntarily dissolved by the Corporation Division of the State of Oregon.

46) The Respondents "Tony" and Lucie Lee continued thereafter to operate the bar and restaurant.

47) On or about February 5, 1987, the Palomino Cafe and Lounge, Inc., was reinstated by the Corporation Division of the State of Oregon upon payment of fees for that purpose.

48) On January 22, 1988, the Palomino Cafe and Lounge, Inc., was again involuntarily dissolved by the Corporation Division of the State of Oregon.

49) The Respondents "Tony" and Lucie Lee continued thereafter to operate the bar and restaurant.

ULTIMATE FINDINGS OF FACT

1) The Respondent Palomino Lounge and Cafe, Inc., an Oregon corporation operating a bar and restaurant in Ontario, Oregon, was owned by the Respondents Woon Y. Lee and Lucie B. Lee, who were the corporate officers and at all times material exercised sole operational control and utilized the personal service of one or more employees.

2) The Respondent Woon Y. Lee, also known as "Tony" Lee, and the Respondent Lucie B. Lee were known as the owners of the Palomino and were the direct supervisors of those persons working there at all times material herein.

3) The Complainant, female, worked as a part time waitress for the Respondents from on or about July 17 to early August 1986; beginning on her first day on the job, and continuing every day throughout her employment she, together with other female employees, was subjected to frequent, pervasive, unwelcome, and uninvited behavior of a sexual nature because of her female sex by the Respondent "Tony" Lee.

4) The Complainant was told by co-workers that Respondent "Tony" Lee was like that to everybody (female), and that she must deal with it. She became apprehensive about being touched all the time in an unwelcome manner and attempted to avoid it. His unwanted touching occurred in front of customers, making her very nervous, embarrassed, and scared, affecting her work; she hated going to work and enduring the unwelcome touching. On at least two occasions she went home after work in tears.

5) Male employees were not subjected to touching, patting, biting, or "hugs" around the waist or shoulders by the Respondent "Tony" Lee. His offensive behavior toward female employees generally did not occur in the presence of Respondent Lucie B. Lee; she was aware of but did not attempt to alter his behavior.

6) In early August, after the Complainant did not accept the offer of the rent-free use of an apartment he owned, Respondent "Tony" Lee terminated her employment. Following this termination the Complainant's upset about the unwanted touching continued. She thought about it a lot and it made her feel uncomfortable. By the time of the hearing, she still thought about it sometimes in connection with her ability to continue working if she were again treated in a like manner.

7) Respondent "Tony" Lee, alleged several legitimate, non-discriminatory reasons for the Complainant's termination; all were pretextual.

8) Between February 1986 and February 1987, the Palomino Cafe and Lounge, Inc., was in an involuntarily dissolved status. The Respondents "Tony" and Lucie Lee continued to operate the bar and restaurant under the same name; the corporation was then reinstated. The actions of the individual Respondents are properly imputed to the corporate Respondent. In January 1988, the Respondent corporation was again involuntarily dissolved, and the Respondents "Tony" and Lucie Lee continued thereafter to operate the bar and restaurant under the same name.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in pertinent part:

> "(6) 'Employer' means any person * * * who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.
>
> "* * *
>
> "(11) 'Person' includes one or more individuals [or] * * * corporations * * *.
>
> "(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

At all times material herein the Respondents, and each of them, were employers subject to the pertinent provisions of ORS 659.010 to ORS 659.435, and of OAR 839-07-500 to OAR 839-07-565.

2) ORS 659.040 provides, in pertinent part:

> "(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof. * * *"

OAR 839-07-515 provides:

> "A person who claims to be aggrieved under laws prohibiting discrimination because of sex may file a complaint with the [Civil Rights] Division. (See OAR 839-03-025 and ORS 659.040.)"

ORS 659.050 provides, in pertinent part:

> "(1) After the filing of any complaint under ORS 659.040 * * *, the commissioner shall cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents in the complaint the names of such persons may be added as respondents thereto. If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110 * * *."

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein, and the authority to eliminate the effects of any unlawful employment practice found.

3) ORS 659.030 provides, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> "* * *
>
> "(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides:

> "Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(2) Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The conduct of Woon Y. Lee directed toward the Complainant due to her female gender was an implicit term and condition of her employment, had the effect of creating an intimidating, hostile, and offensive working environment, and constituted sexual harassment in violation of ORS 659.030(1)(b).

4) OAR 839-07-555 provides, in pertinent part:

"(1) An employer * * * is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment * * *"

ORS 60.647 provides, in pertinent part:

"The Secretary of State may commence a proceeding under ORS 60.651 to administratively dissolve a corporation if:

"(1) The corporation does not pay when due any fees imposed by this chapter; * * *"

ORS 60.651 provides:

"(1) If the Secretary of State determines that one or more grounds exist under ORS 60.647, for dissolving a corporation, the Secretary of State shall give the corporation written notice of the determination.

"(2) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State, within 45 days after notice is given, that each ground determined by the Secretary of State does not exist, the Secretary of State shall dissolve the corporation and give the corporation notice of the dissolution.

"(3) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up its business and affairs under ORS 60.637, and notify claimants under ORS 60.641 and 60.644.

"(4) The administrative dissolution of a corporation does not terminate the authority of its registered agent."

ORS 60.654 provides:

"(1) A corporation administratively dissolved under ORS 60.651 may apply to the Secretary of State for reinstatement. The application shall:

"(a) State the name of the corporation and the effective date of its administrative dissolution; and

"(b) State that the ground or grounds for dissolution either did not exist or have been eliminated.

"(2) If the Secretary of State determines that the application contains the information required by subsection (1) of this section, that the information is correct and that the corporation's name satisfies the requirements of ORS 60.094, the Secretary of State shall reinstate the corporation.

"(3) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred."

The actions, inactions, knowledge and motivation of Woon Y. Lee and Lucie B. Lee, the individual Respondents, in creating the said environment are imputed to their principal, the corporate Respondent. In turn, the liability thereby created was assumed by the individual Respondents, and each of them when, in January 1988, they became successor operators in place of the involuntarily dissolved corporate Respondent.

5) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

Each of the named Respondents, Palomino Cafe and Lounge, Inc., Woon Y. Lee, and Lucie B. Lee, was found in default, pursuant to OAR 839-30-185(1)(a), for failure to file an answer to the Specific Charges. Respondents, through counsel, requested relief from default, which the Forum denied in a written ruling finding that the Respondents had failed to establish good cause for relief.

In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-30-185(2). To present a prima facie case in this matter, the Agency must prove the following four elements:

(1) The Respondent is a Respondent as defined by statute.

(2) The Complainant is a member of a protected class.

(3) The Complainant was harmed by an action of the Respondent.

(4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein. The record in this matter clearly establishes the last three elements of the prima facie case as follows:

(2) The Complainant is female.

(3) The activity of the Respondent Woon Y. (Tony) Lee in constantly and habitually touching the female employees, and particularly the Complainant, on a daily basis served to create a pervasively hostile and intimidating atmosphere in the workplace, which caused the Complainant harm in the form of fear, nervousness, embarrassment, and anxiety, affecting her work and making her upset and uncomfortable up to the time of the hearing.

(4) This action of Respondent "Tony" Lee was taken because the Complainant is female.

The first element, that "The Respondent is a Respondent as defined by statute," requires some evaluation and analysis. There is no doubt that the Complainant worked as a waitress for a business known as the Palomino Cafe and Lounge. The evidence indicates that this was the business name used by Palomino Cafe and Lounge, Inc., an Oregon corporation. This entity was in an administratively dissolved status during the time the Complainant was employed at the Palomino Cafe and endured the sexual harassment by Woon Y. Lee. The record shows that Mr. Lee and Lucie B. Lee exercised operational control of the business, including the hiring and firing of employees. In effect, they operated as a proprietorship when the violation occurred.

In early 1987, the fees required by state law to maintain corporate status were paid. When this occurs with an administratively dissolved corporation, and the unpaid fees were the basis of the dissolution, the law provides that corporate status is reinstated. This reinstatement

> "takes affect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." ORS 60.654(3).

ORS chapter 60, which deals with private corporations, was effective June 15, 1987, as a result of a massive re-write of Oregon corporation law by the 1987 Legislative Assembly. It is the quoted portions of that chapter that were in effect at the time the corporate entity was again involuntarily dissolved in 1988. The statute clearly provides that an involuntarily dissolved corporation can conduct no business except to wind up its affairs. Woon and Lucie Lee continued operating the same business at the same location with the same work force under the same name, Palomino Cafe and Lounge. Thus, they operated as a co-proprietorship. By so doing, they succeeded to the corporation's liability.

Former ORS 57.585(1)(a), (2)(a), (b), and (c), and (4), repealed by the adoption of current ORS 60.001, *et seq*, contained substantially the same provisions regarding reinstatement of a corporation for non-payment of fees, and regarding the effect of the reinstatement in "relating back" to the dissolution as are now contained in the quoted portions of ORS 60.647, 60.651, and 60.654. The 1987 reinstatement served to relate corporate status back to the date of the earlier involuntary dissolution, and the liability created by the sexual harassment carried on by Woon Lee attached to the corporation as having been done by its agent. That liability then passed to the Lees, individually, as successor employers.

The general rule in discrimination cases under federal law regarding successor liability holds the successor entity liable for the acts of the predecessor unless such a holding would be manifestly unjust to the succeeding entity; whether acknowledged or not, the successor has "benefited" from the predecessor's unlawful act:

> "It is to be emphasized that the equities of the matter favor successor liability because it is the successor who has benefited from the discriminatory employment practice of its predecessor. * * *
>
> "Failure to hold a successor employer liable for the discriminatory practices of its predecessor could emasculate the relief provisions of Title VII by leaving the discriminatee without a remedy or with an incomplete remedy. [W]here the predecessor company no longer had any assets, monetary relief would be precluded. Such a result could encourage evasion in the guise of corporate transfers of ownership." *EEOC v. MacMillan Boedel Containers, Inc.*, 8 FEP 897, 901, 503 F2d 1086 (6th Cir 1974).

It seems no less plain that such a result could also encourage the abandonment of the corporate shell by owners of a tightly-held corporation, who could then freely become individual proprietors, using the good will, business, personnel, and assets of the dissolved corporation.

The *MacMillan* case outlines relevant factors, taken from National Labor Relations Act cases, as being equally applicable to successorship considerations in discrimination cases:

> "1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product." *Ibid*, at 902-03.

This nine-point formula was adopted by the Ninth Circuit in *Slack V. Havens*, 522 F2d 1091, 11 FEP 27 (9th Cir 1975).

This Forum has previously considered the successor problem in instances where an owner of a corporation has continued as a proprietorship in place of an insolvent or defunct corporate entity. In *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987), the Commissioner determined that in deciding whether an employer is a "successor," the test is whether it conducts essentially the same business as the predecessor. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new

operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. *See, e.g., NLRB v. Jefferies Lithograph Co.*, 752 F2d 459 (9th Cir 1985). Where the sole owner and president of a dissolved corporation continued operation of the same business after the dissolution, was named in the charging document as a party, and failed to pay wages earned both before and after the dissolution, the owner was liable for all unpaid wages. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68 (1988).

Damages

The Complainant testified to emotional upset caused by the workplace sexual harassment. She was subjected to a daily concern regarding both her physical and her economic well-being. Her concentration was affected adversely, and she experienced embarrassment in front of customers. The offensive behavior, which was the subject of discussion among the female employees, pervaded the total work environment. At least twice, tears evidenced the depth and seriousness of her humiliation and frustration. Even after leaving the Respondents' employ she continued to feel, as an effect of the harassment, a concern with the possibility of having to deal with it again in a subsequent work setting. The Forum has awarded to the Complainant $3500 to help compensate for the anger, frustration, fear, and loss of human dignity, i.e., the mental distress, resulting from sexual harassment by the Respondents.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and 659.060(3) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondents are hereby ORDERED to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Nannette Hesse, in the amount of:

a) THREE THOUSAND FIVE HUNDRED DOLLARS ($3500.00), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; PLUS,

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating in any manner against any current or future employee because of the employee's sex.

In the Matter of
COLONIAL MOTOR INN,
abn Meyer Motels, Ltd.,
Respondent.

Case Number 16-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 19, 1989.

SYNOPSIS

Respondent's motel manager sexually harassed Complainant, a maid, by making unwelcome sexual advances and by other verbal and physical conduct of a sexual nature directed toward complainant because of her sex, which had the effect of creating an intimidating, hostile, and offensive working environment. Respondent was strictly liable for the conduct of its supervisory employee. The Commissioner awarded Complainant damages for mental suffering. ORS 183.415(6), 659.030(1)(b); OAR 839-05-010, 839-07-550, 839-07-555.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on December 28, 1988, in Rooms 106 and 107 of the Jackson County Justice Building, 100 S. Oakdale, Medford, Oregon, in the morning of said day, and in the offices of the Bureau of Labor and Industries, 700 E. Main, Medford, Oregon, in the afternoon of said day. Nadine Faith, a legal intern with the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy, and examined the witnesses. The Colonial Motor Inn, abn Meyer Motels, Ltd., (hereinafter the Respondent), after being duly notified of the time and place of this hearing and of its obligation to file an answer within twenty (20) days of the issuance of the Specific Charges, failed to file an answer as required. The Hearings Referee found the Respondent in default. Martha L. Lutz (hereinafter the Complainant) was present throughout the afternoon portion of the hearing.

The Agency called as witnesses the following: Helen Blair, a former employee of the Respondent; Wilda Jean Anderson, Complainant's co-worker; Beverly Russell, an Investigative Supervisor with the Agency (by telephone); the Complainant; Arline Smith, Complainant's co-worker (by telephone); and Barbara Turner, a Senior Investigator with the Agency (by telephone).

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On July 30, 1987, the Complainant filed a verified complaint with the Civil Rights Division (CRD) of the Agency alleging that she was the victim of the unlawful employment practice of the Respondent.

2) After investigation and review, the CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint, and finding the Respondent in violation of ORS 659.030.

3) Beverly Russell, an investigative supervisor for the Agency approved the Administrative Determination prepared by the investigator, Barbara Turner, and subsequently initiated conciliation efforts between the Complainant and the Respondent on or about May 24, 1987. On July 7, 1987, she concluded that conciliation had failed and referred the case to the Agency's Quality Assurance Unit for further action. The Respondent's representative during investigation and conciliation was Layne Burdick.

4) On November 2, 1988, the Agency prepared and served on the Respondent Specific Charges herein, alleging that the Respondent, by and through its employee and manager Gene Bayless, repeatedly engaged in a course of conduct during Complainant's employment by the Respondent designed to harass, embarrass, intimidate, and humiliate Complainant based on her female sex, creating a hostile and abusive environment, constituting discrimination based on sex in the terms and conditions of Complainant's employment in violation of ORS 659.030(1)(b).

5) With the Specific Charges, the Forum served on the Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On November 10, 1988, the certified mailing of the copies of the documents described in Finding 25 addressed to Layne Burdick at P.O. Box 1725, Medford, Oregon 97501, was returned to the Hearings Unit by the US Postal Service stamped "Returned to Sender, Not Deliverable As Addressed, Unable to Forward"; the Agency was notified of the non-delivery.

7) On November 23, 1988, the Forum mailed to the Respondent and each known representative thereof for which the Forum had a verified address a Notice of Intent to Default which noted that no answer or other response had been received.

8) On December 1, 1988, the Forum found the Respondent in default for failure to file a timely answer or other response. The Notice of Default issued on that date to the Respondent and each known representative thereof allowed until December 12, 1988, for the Respondent to request relief from said default.

9) On December 8, 1988, the Hearings Unit received a telephone call from attorney Larry Workman, Medford, regarding the contested case process in general and a motion for relief from default in particular. The Hearings Unit Coordinator explained the process and discussed the returned mailing to Layne Burdick.

10) On December 12, 1988, the Hearings Unit received a telephone call from attorney Workman and Mr. Burdick regarding information for the affidavit of Mr. Burdick in connection with a request for relief from default.

11) On December 14, 1988, the Forum received from attorney Larry B. Workman a request for relief from default postmarked December 12, 1988, which the Forum finds was timely under the Forum's rules.

12) On December 19, 1988, the Forum denied the motion for relief from default. The Forum found specifically that the Respondent had failed to show good cause for relief from said default, and would therefore be precluded from presentation of evidence in the hearing in this matter. Included in the Forum's ruling were findings that the address used in the attempted service on Mr. Burdick was the correct address, and that Respondent's registered agent, Respondent's vice president, and Respondent's Grants Pass place of business all receipted for copies of the Specific Charges and accompanying documents on November 4 and 5, 1988.

13) Pursuant to OAR 839-30-071, on December 19, 1988, the Agency timely filed a Summary of the Case.

14) No representative of the Respondent attended the hearing of December 28, 1988.

15) At the beginning of the hearing, the Hearings Referee noted that the Complainant was not present due to icy roads between her home and the hearing site and determined to proceed with other witnesses.

16) Pursuant to ORS 183.415(7), the Agency and the Complainant were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The Proposed Order in this contested case was issued on May 2, 1989. Exceptions, if any, were to be filed by May 12, 1989. There were no exceptions received on or before May 12, 1989.

FINDINGS OF FACT – THE MERITS

1) The Respondent Colonial Motor Inn was an assumed business name of Meyer Motels, Ltd., a foreign corporation, operating a motel in Grants Pass, Oregon, beginning on or about June 2, 1986, utilizing the personal service of one or more employees, and controlling the means by which such service was performed at times material herein.

2) The employees' sole contact with the Respondent Meyer Motels was through the resident manager. Most of the employees had never met anyone else in the Respondent's management.

3) The Complainant Martha L. Lutz is a female, who began working at the Colonial Motor Inn as a motel maid on July 12, 1986.

4) Gene and Juanita Bayless were employed as the resident managers of the Colonial Motor Inn by the Respondent. They had been similarly employed by Respondent's predecessor prior to June 1986.

5) Habitually and on a daily basis, manager Gene Bayless made remarks to the female employees which were directly or by innuendo sexual in nature at times material herein.

6) Frequently, Mr. Bayless would remark or suggest to a maid working

alone in a motel room that they get into or onto the bed, or "try the bed."

7) On more than one occasion, Mr. Bayless would also suggest to individual maids to meet him in a room or in the shower in a particular room.

8) Mr. Bayless's reputation for sexual remarks and innuendo were known to the female employees, who said "watch out for Gene."

9) On one occasion, while working on a light with a screwdriver in the presence of Helen Blair, Mr. Bayless, in reference to a screw, suggested that if Ms. Blair ever decided to, to let him know.

10) On another occasion, upon learning that a female applicant's last name was Bacon, Mr. Bayless commented to her that she'd be "good to eat," or words to that effect. The applicant left without completing the application process.

11) At that time, Ms. Blair cautioned Mr. Bayless about his remarks, stating that they were about to lose one maid who had complained to her about him. The maid referred to was Brenda Hamilton.

12) In response, Mr. Bayless said "What did I say? Bacon is good to eat."

13) Following Ms. Blair's admonition, Mr. Bayless stopped his remarks and unwanted touching briefly, then resumed his prior activity in this regard.

14) Brenda Hamilton had complained to Ms. Blair about remarks Mr. Bayless made concerning Hamilton's breasts and behind; Hamilton was quitting as a result of his touching and remarks.

15) Brenda Hamilton terminated employment in March 1986; she filed an administrative complaint with the Civil Rights Division on or about January 27, 1987, citing unwanted touching and sexually oriented comments by Mr. Bayless.

16) Mr. Bayless's behavior and remarks continued after Ms. Hamilton ceased her employment, and continued toward the Complainant and others after the Respondent was notified of Ms. Hamilton's complaint in late January 1987, and until June 1987.

17) Mr. Bayless frequently touched female employees by ruffling their hair, holding their hands, putting his arm around them, and patting their shoulders.

18) The female employees who were touched in this manner would move away and tell him to stop.

19) The comments and actions of Mr. Bayless toward the female employees were the subject of conversation among the maids while loading their carts at the beginning of each day, and at lunch and at breaks.

20) The female employees found the behavior of Mr. Bayless to be very unwelcome and offensive.

21) The unwelcome touching was frequent; the sexually intended remarks and the female employees' discussion of the behavior of Mr. Bayless were a daily occurrence.

22) Working around Mr. Bayless alone scared the Complainant, as it did other female employees.

23) Many of the maids attempted to deal with Mr. Bayless by leaving the room if they were alone with him.

24) The maids complained to Ms. Blair, who was head housekeeper until September 1986, about Mr. Bayless coming into rooms where they were working alone and making sexually oriented remarks.

25) If possible, when Mr. Bayless was around, the maids worked together rather than working alone.

26) Shortly before she left the Respondent's employ in or about September 1986, Ms. Blair again warned Mr. Bayless about his frequent "try the bed" comments.

27) Most of the females who do motel maid work need the job; many are single; they just didn't know if they would lose the job if they didn't put up with Mr. Bayless's behavior, but some feared they might.

28) The female employees felt less threatened by Mr. Bayless when Juanita Bayless, his wife, was available on the premises.

29) The male gardener who worked at the motel was not subjected to the touching and suggestive remarks that Mr. Bayless accorded the female maids.

30) The maids also witnessed Mr. Bayless make suggestive remarks to female motel guests; at least one female customer complained to a maid about comments by Mr. Bayless; he offered to meet female customers in their rooms.

31) On one occasion when a female guest and her daughter needed a room door lock repaired, Mr. Bayless commented that he wouldn't mind being locked in with either of them.

32) Female customers complained about Mr. Bayless suggesting to them "I'll meet you in your room later"; the Complainant believed that the motel lost its Reno bus tour customers as a result.

33) Ms. Blair let his remarks "roll off" but was made uncomfortable by them. She wasn't afraid, but did not welcome the remarks.

34) Ms. Anderson did not feel threatened by Mr. Bayless; Ms. Blair had warned him that Ms. Anderson would "deck him" if he tried anything with her. Ms. Anderson did strike his hand on the one occasion he attempted to touch her.

35) Ms. Smith attempted to ignore the remarks of Mr. Bayless, but they did make her feel "sort of sick."

36) The Complainant did not trust Mr. Bayless. His actions and remarks "scared her in a way."

37) Mr. Bayless constantly talked to the Complainant about meeting him in the shower. He would push a room key to her and tell her to meet him in the room.

38) Mr. Bayless told the Complainant that he would see to it that she would do better and get further with the company, and that she had a job if she would cooperate with him by meeting him in a room after work.

39) Mr. Bayless "thought he owned us girls."

40) Mr. Bayless patted the Complainant on the bottom and grabbed her around the waist while she was washing a window in the office.

41) The Complainant reacted to this touching, which she found offensive, by gathering up her step-stool and cleaning supplies and leaving.

42) The Complainant reported this touching incident to Arline Smith, the

head maid after Ms. Blair quit, who instructed her to finish it when Juanita Bayless had returned.

43) Sometimes the maids would be asked to make up a room that had been unoccupied the night before, that is, an "extra" room not on the books; Mr. Bayless would state that it had been broken into; the maids would speculate as to "which girl he got to come up here."

44) When the maids cleaned a room after relatives of Mr. and Mrs. Bayless had stayed at the motel, the maids were paid in cash in order that the transaction not show on the books.

45) After the Complainant had cleaned a room which had been occupied by a relative of Mr. Bayless, Mr. Bayless pressed $2.00 in quarters into her hand and scratched her palm with his finger; he stated at that time that she should cooperate and things would go better.

46) The Complainant believed that Mr. Bayless meant that she should go to bed with him. The incident upset the Complainant. She commented to another employee "that old so and so," and put the coins down on the counter and walked out.

47) During parts of November and December 1986, while Juanita Bayless was out of town for an extended period, the Complainant received frequent telephone calls in the evening from Mr. Bayless.

48) These calls occurred two to three times each night during the three or more weeks Mrs. Bayless was in Texas.

49) Mr. Bayless asked during these calls that the Complainant come to the motel, stating that he was lonesome, and that he would leave a particular room open for her.

50) The persistent phone calls made the Complainant nervous and upset; she feared she would be fired.

51) The Complainant's granddaughter (age eight), who lived with the Complainant, became upset in turn because of the calls and her grandmother's reaction to them.

52) The Complainant unplugged the telephone at times during this period to avoid the calls. Finally she had the phone disconnected.

53) The Complainant reported the phone call situation to Arline Smith. She also told Wanda Anderson.

54) Ms. Smith asked her husband to speak with Mr. Bayless about the calls to the Complainant, among other things, as Mr. Bayless was "getting on everyone's nerves" while his wife was gone.

55) Mr. Smith did confront Mr. Bayless, who admitted calling the Complainant, but only to come in and clean rooms.

56) Mr. Smith was seen to have Mr. Bayless "backed against the wall" at the time.

57) There was no known legitimate evening maid work available at the motel during this period.

58) Betsy Gress (phonetic) was paid by Mr. and Mrs. Bayless to watch the switchboard and the motel at night. Her husband, Howard "Whitey" Gress, did some maintenance at the motel while his wife worked. He did not want her there alone at night.

59) The Complainant reported the phone calls to "Whitey," who confronted Mr. Bayless and was told that Mr. Bayless was going to apologize to all of the maids for his conduct. Mr. Bayless never did.

60) Following his meeting with Mr. Smith, Mr. Bayless ceased his sexually oriented remarks for about two weeks, then resumed.

61) The Complainant did not like working at the motel. She eventually found a second job at another motel. The behavior of Mr. Bayless caused her tension and stress, and made her uncomfortable and irritable.

62) As a result of the behavior of Mr. Bayless, the Complainant sometimes missed work rather than endure his behavior.

63) The Complainant had high blood pressure. Her physician, Dr. Kelly, increased her blood pressure medication because she was experiencing light-headedness while she worked for the Respondent.

64) The Complainant's blood pressure has gone back down since she left the Respondent's employ.

65) The Complainant endured the described behavior and conduct of Mr. Bayless on a daily basis from her initial employment until about a week before her employment terminated.

66) In June 1987, the Complainant telephoned the headquarters of Meyer Motels and complained of sexual harassment. Mr. and Mrs. Bayless were gone within a week, and a new manager was moved in.

67) Complainant's employment with Respondent terminated in late June 1987.

ULTIMATE FINDINGS OF FACT

1) The Respondent Colonial Motor Inn was an assumed business name of Meyer Motels, Ltd., a foreign corporation operating a motel in Grants Pass, Oregon, from June 1986, and utilizing the personal service of one or more employees. The employees' sole contact with the Respondent Meyer Motels was through its resident managers. Most of the employees had never met anyone else in the Respondent's management.

2) The Complainant is a female who worked as a motel maid from July 12, 1986, through late June 1987 at the Colonial Motor Inn.

3) Gene and Juanita Bayless were employed by the Respondent and by the Respondent's predecessor as resident managers of the Colonial Motor Inn. Habitually and on a daily basis manager Gene Bayless subjected the Complainant and other female employees, because of their female sex, to frequent touching in a sexual manner, and to remarks which directly or by innuendo were sexual in nature. This frequent, pervasive, unwelcome, and uninvited behavior of a sexual nature created a hostile, intimidating, and offensive working environment. He also made suggestive remarks to female motel guests. Males were not subjected to touching and suggestive remarks of a sexual nature. Some female employees were not frightened or threatened by the unwelcome remarks, but were made uncomfortable by them.

5) A former maid filed a Civil Rights Division complaint in January 1987 alleging unwanted touching and sexually oriented comments by Mr.

Bayless. His behavior and remarks continued toward the Complainant and others after the Respondent was notified of this complaint.

6) During a period in late 1986 the Complainant received several telephone calls at home each night from Mr. Bayless, who asked that she come to the motel where he would leave a particular room open for her. Mrs. Bayless was in Texas at the time. There was no known legitimate evening maid work available at the motel during this period.

7) The Complainant distrusted Mr. Bayless. He scared her by constantly suggesting that she meet him in the shower or in a room, and telling her that he would see to it that she would succeed with the company if she would cooperate with him. The persistent phone calls made the Complainant nervous and upset. She feared she would be fired. She did not like working at the motel. The behavior of Mr. Bayless caused her tension and stress, making her uncomfortable and irritable. She sometimes missed work rather than endure this. Her physician increased her blood pressure medication because she was experiencing light-headedness.

8) The Complainant endured the described behavior and conduct of Mr. Bayless on a daily basis from her initial employment until about a week before her employment terminated in late June 1987.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in pertinent part:

"* * *

"(6) 'Employer' means any person * * * who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

"* * *

"(11) 'Person' includes one or more individuals [or] * * * corporations * * *.

"(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

At all times material herein the Respondent was an employer subject to the pertinent provisions of ORS 659.010 to 659.435 and of OAR 839-07-500 to 839-07-565.

2) ORS 659.040 provides, in pertinent part:

"(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof. * * *"

OAR 839-07-515 provides:

"A person who claims to be aggrieved under laws prohibiting discrimination because of sex may file a complaint with the [Civil Rights] Division. (See OAR 839-03-025 and ORS 659.040.)"

ORS 659.050 provides, in pertinent part:

"(1) After the filing of any complaint under ORS 659.040 * * *, the commissioner shall cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents in the complaint the names of such persons may be added as respondents thereto. If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110 * * *."

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein, and the authority to eliminate the effects of any unlawful employment practice found.

3) ORS 659.030 provides, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

"* * *

"(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(2) Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The conduct of Gene Bayless directed toward the Complainant due to her female gender was an implicit term and condition of her employment, had the effect of creating an intimidating, hostile, and offensive working environment, and constituted sexual harassment in violation of ORS 659.030 (1) (b).

4) OAR 839-07-555 provides, in pertinent part:

"(1) An employer * * * is responsible for its acts and those of

its agents and supervisory employees with respect to sexual harassment * * *."

The actions, inactions, knowledge, and motivation of Gene Bayless, an employee and agent of the Respondent, are properly imputed to the Respondent.

5) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

The named Respondent Colonial Motor Inn, an assumed business name of Meyer Motels, Ltd., was found in default, pursuant to OAR 839-30-185(1)(a), for failure to file an answer to the Specific Charges. Respondent, through counsel, requested relief from default, which the Forum denied in a written ruling finding that the Respondent had failed to establish good cause for relief. In addition, no representative of Respondent attended the scheduled hearing, and thus Respondent also defaulted pursuant to OAR 839-30-185(1)(b).

In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-30-185(2).

To present a prima facie case in this matter, the Agency must prove the following four elements:

(1) The Respondent is a Respondent as defined by statute.

(2) The Complainant is a member of a protected class.

(3) The Complainant was harmed by an action of the Respondent.

(4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein.

The evidence established that the female Complainant was employed by a corporation, Meyer Motels, Ltd., which operated under the name of Colonial Motor Inn in Grants Pass, Oregon. The Complainant experienced emotional distress, humiliation, and embarrassment as a result of unwelcome and uninvited offensive behavior of a sexual nature by the corporation's male resident manager. The manager's activities were characterized by a disregard for the dignity of the Complainant and other female employees which went far beyond mere insensitivity to women. The evidence strongly indicates that Mr. Bayless used his position as manager to gratify or to attempt to gratify his libidinous fantasies: he "invited" the Complainant and other maids to test the beds with him and to share the shower with him, and expected them to endure his unwanted and suggestive touching and speech. He used his position as manager to attempt to get the Complainant to join him in a room at the motel at a time when his wife was away.

The objects of the manager's harassment, including the Complainant, were all female. It was because of their sex that they were victimized. The result of his behavior was that all of the female employees were made upset and uncomfortable. Some, including the Complainant, feared for their jobs precisely because the harasser was the boss. There was no evidence that any of the female employees knew of any immediate available alternative to enduring the harassment, except to avoid it by removing themselves either temporarily or permanently from its source. There was no policy or procedure to deal with such a situation other than for the maids to rely on the assertiveness of the head housekeepers, who were subordinate to the manager, or to use the presence of the manager's wife, or each other, for protection.

The resident managers, Mr. and Mrs. Bayless, were the only corporate representatives on site or known to the staff of the Grants Pass Colonial Motor Inn. There was no evidence that the staff approached Mrs. Bayless about her husband's behavior. It is not clear whether this was out of reluctance for fear of retaliation, or out of embarrassment for the maids or Mrs. Bayless, or from a perception that such an approach would not be believed. The evidence in the record suggests only that the sexual harassment by Mr. Bayless did not occur in his wife's presence. For the reasons outlined herein, it is not material whether the co-manager had notice of the offensive activity.

The evidence shows that Gene Bayless was the employee of the corporate respondent, and that he exercised the supervisory authority granted to him by the Respondent over the other employees on site at the Colonial Motor Inn. In the exercise of that authority he sexually harassed his female subordinates.

In finding the Respondent employer responsible for this harassment and its consequences, the Forum does not suggest that the offensive activity was specifically authorized by the Respondent as part of the job. Rather, the activity and behavior described are so inextricably intertwined with the manager's legitimate duties as to make it impossible to separate out those actions which might be characterized as outside the scope of his employment.

Oregon Administrative Rule 839-07-555(1), quoted in part in the Conclusions of Law, makes the employer liable for its acts and "those of its agents and supervisory employees" when those acts constitute sexual harassment. That far, the rule is a reflection of "respondent superior" existing in all discrimination law. However, recognizing the often powerless position of a victim of sexual harassment, the rule goes even further, imposing liability on the employer for the acts:

"of its agents and supervisory employees with respect to sexual harassment regardless of whether:

"(a) The specific acts complained of were authorized by the employer; or

"(b) The specific acts complained of were forbidden by the employer; or

"(c) The employer knew or should have known of the

occurrence of the specific acts complained of."

The rule imposes absolute liability on an employer for sexual harassment in employment by the employer's agent or supervisory employee.

While this may seem harsh, it is far superior to requiring actual notice to the manager's superiors where no procedure for such a report was in place, and where there was a perception, right or wrong, existing among the employees that such a report might jeopardize the employment status of the individual initiating it. No employee should be placed in a position of peril as to the employee's employment status as a consequence of reporting an unlawful employment practice. For the Forum to require that the employee shoulder this risk, real or not, would seriously inhibit if not totally defeat the effort to eliminate sexual harassment.

The legislature has generally recognized that retaliation might occur when an aggrieved individual exercises the statutory right to oppose unlawful practices, and has made such retaliation itself unlawful (*see*, for example, ORS 659.030(1)(f)). But this is cold comfort when the employee evaluates the risk of job loss against the unknown and unknowable possibility of relief from the harassment, and colder comfort still if the risk becomes reality.

The Complainant endured almost a full year of the sexually hostile environment, and had found other work before chancing a direct complaint to the superiors of Mr. Bayless. While it can be inferred from the record and the timing that her report hastened his departure as manager, it does not follow that the Respondent should be insulated from the consequences of its own prior benign neglect. Where there is no procedure in place for grieving sexual harassment, or where such a procedure or the existing circumstances necessarily encompass grieving initially to the accused harasser, the employer should without question be responsible for the consequences of the sexual harassment of aggrieved employees.

Damages

The Complainant testified to emotional upset caused by the workplace sexual harassment. She was subjected to a daily concern regarding both her physical and her economic well-being, which made her nervous and upset. She suffered fear, distrust, tension, stress, discomfort, irritability, elevated blood pressure, humiliation, and embarrassment. The offensive behavior, which was the subject of discussion among the female employees, was frequent, unwelcome, and uninvited, and pervaded the total work environment making it hostile, intimidating, and offensive. As a result, she did not like working there and sometimes missed work, despite needing the job and its earnings. The episode of the persistent phone calls reached into her off-duty life and affected family. For economic reasons, she endured the daily stress for the better part of a year. On the other hand, there was no evidence of continuing upset after she left the Colonial. Once she was free of the hostile environment, her blood pressure was reduced. The Forum has awarded to the Complainant $4,000 to help compensate for the anger, frustration, fear, and loss of human dignity, i.e., the mental distress, and for the physical distress resulting from sexual harassment by the Respondent's agent and servant.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and 659.060(3) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent is hereby ORDERED to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Martha L. Lutz, in the amount of:

a) FOUR THOUSAND DOLLARS ($4,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating in any manner against any current or future employee because of the employee's sex.

In the Matter of

LEONARD D. WILLIAMS,

dba Williams & Clan Forest Improvement, Respondent.

Case Number 23-87

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 11, 1989.

SYNOPSIS

Respondent, an unlicensed farm labor contractor, recruited and solicited workers in Oregon to perform tree thinning work in Alaska, in violation of ORS 658.410. The term "worker" includes a member of a profit-share arrangement. Respondent did not willfully make misrepresentations regarding a partnership arrangement with the workers. Respondent complied with the terms of his contract with the U.S. Forest Service (USFS), where he completed his contract during its first extension of time in a manner satisfactory to the USFS, and the USFS imposed its own sanction short of contract termination to address the late completion. The Commissioner assessed a $500 civil penalty against Respondent for his first violation of ORS 658.410 and 658.415. ORS 658.405, 658.410, 658.415, 658.417, 658.440 (1) and (2), 658.453; OAR 839-15-004, 839-15-510.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of

Oregon. The hearing was conducted on June 17, 1988, in the conference room of the Bureau of Labor and Industries Office, 700 E. Main Street, Medford, Oregon. Lee Bercot, Hearings Coordinator for the Wage and Hour Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a summary of the case for the Agency. Leonard D. Williams, dba Williams & Clan Forest Improvement (hereinafter the Contractor), was present throughout the hearing and not represented by counsel.

Through the Hearings Referee, the Agency called as witnesses Lee Bercot; Ron Kimmons, an employee of the Agency; Sandra Sterling, Licensing Unit Manager of the Agency, who testified by telephone; and Dennis Varga, who worked with the Contractor at times material. The Contractor testified and cross-examined the Agency witnesses; he also presented an affidavit from Leonard D. Williams, II, who worked with the Contractor at times material, and unsworn letters from Edward W. Shippy and Joe D. Wallace, both of whom worked with the Contractor at times material. Following the hearing of testimony, both the Agency and the Contractor submitted additional documents requested by the Referee.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On March 30, 1988, the Agency issued a "Notice of Intent to Assess Civil Penalty" to the Contractor. The notice cited the following bases for this assessment:

a) acting as a farm labor contractor without a farm labor contractor's license (violation of ORS 658.410(1) and 658.415(1); penalty sought, $500.00).

b) willfully making a false, fraudulent, or misleading representation concerning the terms, condition, or existence of employment (violation of ORS 658.440(2)(b); penalty sought, $1,000.)

The Notice was served on the Contractor on April 18, 1988.

2) By letter dated May 3, 1988, the Contractor requested a hearing on the Agency's intended action.

3) On May 6, 1988, the Agency received the Contractor's answer to the "Notice of Intent to Assess Civil Penalty." In his answer, the Contractor denied the necessity for a farm labor contractor's license at times material, asserting that the work involved was in Alaska; the Contractor further denied any false, fraudulent, or misleading representation concerning the terms, condition, or existence of employment, and asserted that persons recruited were aware that the terms and conditions involved a "working partnership" to be agreed upon, entered into, and performed in the State of Alaska.

4) On May 16, 1988, the Forum issued to the Contractor and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee.

5) With the hearing notice, the Forum sent to the Contractor a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 to OAR 839-30-200.*

6) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, the Contractor did not submit a Summary of the Case.

7) At the start of the hearing, the Contractor said that he had received and read the "Notice of Contested Case Rights and Procedures" and had no questions about it.

8) Pursuant to ORS 183.415(7), the Agency and the Contractor were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) At the close of testimony, the Agency orally requested that the record remain open pending receipt of certain items of evidence which the Agency termed crucial to its presentation; the Forum ruled that the Agency should submit its various requests involving documentary evidence, amendment to the charging document, and a supplementary policy statement in writing.

10) On June 21, 1988, pursuant to the Forum's ruling, the Agency filed its "Motion For Documentary/Testimonial Evidence," "Motion To Amend Charging Document," and "Motion To Submit Statement Of Agency Policy," with a copy of same sent to the Contractor.

11) On June 30, 1988, the Hearings Referee ruled on the various motions as follows:

a) The record was to remain open until 5 p.m., July 15, 1988, for receipt of the items enumerated as allowed in the ruling;

b) The Agency was allowed to submit to the Forum, with a copy to the Contractor, its Statement of Policy regarding:

i) partnership;

ii) false, fraudulent and misleading representations.

c) The Notice of Intent to Assess Civil Penalties was amended to include the alternative charge of violation of ORS 658.440(1)(d), alleging that Contractor failed to comply with the terms and provisions of a legal and valid contract entered into as a farm labor contractor, referring specifically to the US Forest Service of the US Department of Agriculture (USFS) contract around which this matter centers, and including a civil penalty of $500 for this violation. This motion was made pursuant to OAR 839-30-075, and was granted because the amendment reflected issues and evidence previously

* The hearings rules, OAR 839-30-020 to 839-30-200, were revised subsequent to initiation of this proceeding, effective June 16, 1988. This case was heard in accordance with the rules as they existed prior to the June 16, 1988, amendments.

introduced into the record without objection from the Contractor. Because it was proposed as an alternative charge to conform to the evidence and issues at hearing, this amended charge, if sustained, is in lieu of, and not in addition to, the original charge of willfully making a false, fraudulent or ,misleading representation.

d) The Agency was allowed to obtain and submit affidavit evidence from the USFS regarding Contractor's partnership agreement, and was also allowed to obtain and submit documentation of the existence of wage claims arising under the USFS contract central to this matter.

e) The Contractor was ordered to submit copies of his 1985 (*sic*) and 1986 (*sic*) federal tax returns, including 1099 forms, and a copy of the handwritten monthly ledger for the periods 1985 (*sic*) and 1986 (*sic*).

12) On July 7, 1988, following the Contractor's receipt of the rulings of June 30, the Forum, in response to the Contractor's inquiry, issued a correction and clarification to its ruling explaining the presumed relevance of the tax information, and correcting the time period covered to 1986 and 1987, instead of 1985 and 1986, respectively. The Contractor was also given leave to submit additional evidence having a bearing on the information requested by the Agency.

13) On July 13, 1988, the Forum received the Contractor's submission resulting from the ruling of June 30, 1988, as clarified and corrected on July 7, 1988.

14) On July 15, 1988, the Forum received the Agency's submission resulting from the ruling of June 30, 1988.

15) On July 15, 1988, pursuant to the June 30, 1988, ruling, the Forum closed the record herein.

16) On October 25, 1988, a Proposed Order in this matter was issued and mailed to all persons listed on the face of the certificate of mailing at their last known addresses. Included in the Proposed Order was an Exceptions Notice which allowed ten (10) days for the filing of any exceptions. Expiration of the due date was calculated to be that exceptions had to be received by and/or postmarked by November 4, 1988, to be accepted. Exceptions were filed by the Wage and Hour Division of the Bureau of Labor and Industries and were received by the Hearings Unit in a timely manner. Those exceptions have been spoken to in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) The Contractor is a natural person, who was previously licensed as a farm labor contractor with forest labor contractor indorsement* in license years 1984 and 1985, employing persons for the purposes of forestation and reforestation.

* ORS 658.417 requires that one who acts as a farm labor contractor with regard to the forestation and reforestation of lands must, among other requirements, obtain a special indorsement authorizing such activity and pay a higher fee than a farm labor contractor not involved with forestation or reforestation. OAR 839-15-004 defines such a farm labor contractor as a "forest labor contractor."

2) Under the prior licenses, the Contractor did business as Williams & Clan Forest Improvement, and was a sole proprietor.

3) Both the original application and the renewal application for a farm/forest labor contractor's license contain a form of attestation to be signed by the applicant to the affect that the applicant:

> "would at all times conduct the business of a farm and forest contractor in accordance with ORS chapter 658 and the rules of the Commissioner of the Oregon Bureau of Labor and Industries; * * *."

4) Near the end of each license year, the Agency supplies each licensed farm labor contractor with application forms and materials for renewal of the farm labor contractor license for the ensuing year.

5) The Contractor signed the attestation on the 1984 application and on the 1985 renewal application.

6) The Contractor's written response to the Agency's inquiry concerning renewal of his license for 1986 stated that he would be working outside the State of Oregon for the entire year and would not be renewing the license.

7) The Contractor was unlicensed as a farm /forest labor contractor in Oregon from January 31, 1986, to April 1, 1988.

8) The Contractor was granted a 1988 farm/forest labor contractor license on April 1, 1988. In response to a question regarding whether he was a plaintiff or defendant in any suit or proceeding at the time of the application, the Contractor answered in the negative.

9) The Contractor received record notice of the within proceeding on April 18, 1988.

10) In late 1985, on more than one occasion, the Contractor discussed with Dennis M. Varga and others an opportunity for tree-thinning in Alaska. The arrangement was to work on shares, or a "partnership," with a draw against an hourly guarantee. The Contractor would advance food, transportation, and equipment, with the expense thereof, as well as draws taken, to be taken against the USFS contract progress payments. The remaining funds, after reimbursement of the Contractor and deduction of draws paid, were to be divided equally among the workers, or "partners," including Contractor personally.

11) In late 1985, the Contractor bid upon a reforestation contract opportunity sited in the State of Alaska with the USFS. The bid was in the name of Williams & Clan, and signed by the Contractor as "Business Agent."

12) The Contractor's bid was successful, provided it was correctly stated. Because it was below the USFS estimate for a portion of the work, the USFS required that Contractor verify the bid figure within five days of receipt of its letter of December 18, 1985. The USFS also required that any partnership be identified to it, together with the identity of the responsible member(s) of any partnership.

13) The Contractor obtained the signatures of himself, Leonard D. Williams II (Contractor's son), Joe D. Wallace (Contractor's son-in-law), and

James R. Watkins on the Forest Service form, "Statement of Partnership," on January 2, 1986, and forwarded same on that date to the federal agency, together with a verification of the bid figure.*

14) The Contractor was unable to reach the other two persons who were to join the enterprise, Dennis Varga and Steven Priddle, and, believing that the five-day limit for bid verification also applied to the partnership statement, the Contractor transmitted the partnership form with the four available signatures, and advised the USFS that two more "partners" were anticipated.

15) The six named members of the enterprise traveled to Alaska. The expenses from the continental US to Wrangell, Alaska, and from Wrangell to Zarembo Island, were advanced by the Contractor.

16) The Contractor had created a document, denominated "Articles of Co-Partnership," using Stevens-Ness Form 1162, which outlined the agreement regarding funding, reimbursement, draws against proceeds, and division of net profits. This was signed by all six members of the enterprise before a notary public at a bank in Wrangell, Alaska, on April 16, 1986.

17) Specifically, the agreement provided for a draw of $9.28 per hour for each hour worked, a reserve of $59,305, which was to reimburse advances made by the Contractor, a reserve of $10,000 for financing future bids, and an anticipated $ 90,000 to be shared as profit.

18) The agreement provided that each participant would pay his own insurance and withholding, was liable for his own injuries, and that "Williams and Clan Co-Partnership" was not liable for any debts incurred by any partner. Printed provisions regarding the keeping of books and inspection thereof by any partner, and regarding restrictions on the execution of notes or sureties, were stricken.

19) The agreement provided that if any partner withdrew, i.e., quit, prior to the completion of the USFS contract, he thereby accepted his hourly draw to date as his share of the agreement. Also, if a majority of the participants agreed that one was not performing adequately or was causing friction or tension, he must withdraw and accept the hourly draw to date as his share.

20) The members of the enterprise began work under the USFS Contract. Progress payments were made by the USFS to Williams & Clan and banked by the Contractor

21) The Contractor paid each worker $9.28 per hour for the hours the individual worker had worked. No federal income tax, social security, or other wage deductions were withheld.

22) The USFS dealt with the Contractor, Leonard D. Williams, or, in his absence, with Leonard D. Williams, II, or Joe D. Wallace, whomever was on the job site at the time. This was in accordance with USFS operating procedures, and was authorized by all signers of the document signed in Wrangell.

* Contractor's cover letter to the Forest Service is dated "January 2, 1985." This is an inadvertent error: the document accompanying it, "Statement of Partnership," was notarized on January 2, 1986.

23) The Contractor, or, in his absence, Leonard Williams, II, or Joe D. Wallace, chose the daily work site as indicated by the completion needs of the USFS contract.

24) The agreed upon hourly draw rate of $9.28 was the same rate as the minimum specified for laborers under the federal Service Contract Act, which governs payment of laborers by a contractor on a USFS contract for forestation/ reforestation.

25) The Contractor was aware that the draw rate was identical, stating it "caught my eye at the time."

26) The anticipated time for completion was originally 200 days.

27) The Forum officially notes that the number of days between April 21 and November 7 is 200 days.

28) USFS inspections of the work progress and quality were made periodically between April 21, 1986, and October 24, 1986, beginning April 22. Dates, contract time elapsed, work completed, and workers present for each inspection were as follows between April and September:

Date	Time	Complete	Workers
April 24	NA	NA	6
May 9	9.5 %	9 %	6
May 30	18.0 %	12 %	5
July 2	36.0 %	20 %	5
July 30	50.0 %	24 %	-
August 18	59.0 %	24 %	-
August 26	64.0 %	28 %	4

29) By letter dated August 8, 1986, the USFS advised the Contractor that it was necessary to submit a revised schedule, since as of July 30, 24 percent of the contract acreage had been completed in 50 percent of the contract time. It also noted an apparent reduction in crew, as only two workers were observed at the time of the inspection.

30) James Watkins did not work after mid-May 1986. He quit to fish commercially.

31) Dennis Varga did not work between July 26 and August 12, 1986. The Contractor stated that Varga returned temporarily to Oregon during that time.

32) Leonard Williams, II, did not work between July 3 and August 16, 1986.

33) Steve Priddle did not work after August 6, 1986.

34) By letter dated August 22, 1986, the USFS confirmed an earlier discussion with Contractor to the effect that it would tentatively allow Contractor to return in the 1987 season, in a default status, to complete the thinning contract, provided "[y]ou can show good progress in the remaining field season, * * *."

35) The USFS suspended work on the contract effective October 24, 1986, due to "winter weather."

36) Those persons still working at the project left Alaska on or about November 1, 1986, with the contract only partially completed.

37) Between November 1986 and March 1987, the Contractor was aware that more participants were needed to complete the contract in the 1987 season. In the geographic area of his home near Grants Pass, Oregon, he attempted to interest more individuals in the enterprise by word of mouth through informal discussions with friends, former employees, and acquaintances.

38) On March 3, 1987, the Contractor placed a job order with the Grants Pass office of the Oregon Employment Division for a forest worker to thin trees at a wage of $9.58 (sic) per hour; the location of the work was given as near Wrangell, Alaska.

39) Joe Morgan was among those responding through the Employment Division.

40) The object of the enterprise, as explained by the Contractor to Mr. Morgan, was the completion of the 1986 USFS contract. Again, it was denominated a "partnership," with the net proceeds after deduction of draws and expenses to be divided equally among the participants. The Contractor would furnish transportation from Grants Pass to Seattle; each participant was to furnish his own transportation from Seattle to Wrangell, then the clan boat would take the participants to Zarembo Island. In 1987, each was responsible for his own food after the first six weeks.

41) The initial terms and conditions described to Mr. Varga in 1986 and to Mr. Morgan in 1987 involved a draw or guarantee of $9.28 per hour, plus an advance of food, transportation, and shelter (limited in 1987), plus a partnership share in the contract proceeds that were in excess of those items advanced by the Contractor or drawn against individual hours worked.

42) On March 9, 1987, a document denominated "Articles of Co-Partnership" and again utilizing portions of Stevens-Ness Form 2162 was signed before a notary public in Wrangell, Alaska, by Leonard D. Williams, Leonard D. Williams, II, Joe D. Wallace, Dennis M. Varga, Joe R. Morgan, Edward D. Shippy, Dave A. Greenberg, and Warren Williams, II.

43) Again, the agreement provided for a draw of $9.28 per hour for each hour worked. The specific figures relating to reserves to reimburse advances made by the Contractor, and for financing future bids, were not included, but all "capital expenditures" by the Contractor for tools, equipment, and advances were to be reimbursed. No specific amount was designated to be shared as profit.

44) The 1987 agreement provided that each participant would pay his own insurance and withholding, was liable for his own injuries, and that "Williams and Clan co-partnership" was not liable for any debts incurred by any partner. Printed provisions regarding the keeping of books and inspection thereof by any partner, and regarding restrictions on the execution of notes or sureties, were noted as "NA."

45) The 1987 agreement again provided that if any partner withdrew, i.e., quit, prior to the completion of the USFS contract, he thereby accepted his hourly draw to date as his share of the agreement. Also, if a majority of the participants agreed that one was not performing adequately or was causing friction or tension, he must withdraw and accept the hourly draw to date as his share.

46) Also appearing on that document are the purported signatures of Harold Carter, Julian A. Benitez, Nicolas Mendoza Meroz, Cruz Orozco Edindo, and Samuel Esparza.

47) Both the 1986 and 1987 documents recited that if a signer quit or abandoned the enterprise prior to completion, he would forfeit any right to share the net proceeds.

48) On March 16, 1987, the USFS allowed recommencement of work toward completion of the contract, without penalty until May 1, 1987. After May 1, the contract was in "default status," meaning that $10.00 per day was deducted as "liquidated damages" for each day expended after May 1 in completing the contract.

49) The signers of the 1987 agreement began working on Zarembo Island in March 1987, in an effort to complete the USFS Contract.

50) Time records submitted and testified to by the Contractor indicate that the following worked on the project in March, 1987:

Leonard (Leonard D. Williams); Lenny (Leonard D. Williams II); Joe Wallace; Dennis (Dennis M. Varga); Dave (Dave A. Greenberg); Warren (Warren Williams, II); Joe Morgan; Edward (Edward D. Shippy); Jim ( ).

51) Time records submitted and testified to by the Contractor indicate that the following worked on the project in April 1987: Leonard (Leonard D. Williams); Lenny (Leonard D. Williams II); Joe Wallace; Dennis (Dennis M. Varga); Dave (Dave A. Greenberg); Warren (Warren Williams, II); Joe Morgan; and Edward (Edward D. Shippy).

52) Time records submitted and testified to by the Contractor indicate that the following worked on the project in May 1987: Leonard (Leonard D. Williams); Lenny (Leonard D. Williams II); Joe Wallace; Dennis (Dennis M. Varga); Dave (Dave A. Greenberg); Warren (Warren Williams, II); Joe Morgan; and Edward (Edward D. Shippy).

53) Time records submitted and testified to by the Contractor indicate that the following quit the project in May 1987: Dennis (Dennis M. Varga); Dave (Dave A. Greenberg); Warren (Warren Williams, II); Joe Morgan; and Edward (Edward D. Shippy).

54) Again, the USFS dealt with the Contractor, Leonard D. Williams, or, in his absence, with Leonard D. Williams, II, or Joe D. Wallace, whomever was on the job site at the time. This was in accordance with USFS operating procedures, and was authorized by all signers of the second document signed in Wrangell.

55) Again, the Contractor, or, in his absence, Leonard Williams, II, or Joe Wallace, chose the daily work site as indicated by the completion needs of the USFS contract.

56) Mr. Varga quit based on his discovery that neither the 1986 nor the 1987 "Articles of Co-partnership" documents he had signed were on file with the USFS.

57) The Contractor did not render an accounting of the contract proceeds at any time while the participants were working together on Zarembo Island.

58) The contract was completed on or about October 13, 1987, in a default status, for which $1,520 was withheld by the USFS; final payment was paid in November 1987 by the USFS.

59) In June 1987, pursuant to a letter of inquiry and complaint written by Dennis M. Varga, the Agency initiated an investigation of the Contractor's actions relative to forestation and reforestation activities, including alleged recruitment in Oregon for such work in 1986 and 1987.

60) In response to the Agency's inquiry as part of its investigation, the Contractor asserted that the work for which the Employment Division job order was placed was on a partnership basis, outside the State of Oregon, and did not involve hiring.

61) One element of an employer-employee relationship as opposed to a partnership or cooperative which the Agency evaluates is the extent and nature of control by the alleged employer. By the Agency's standards, the Contractor was considered an employer.

62) In the course of the investigation, the Agency directed an inquiry to Joe Morgan, 2254 Redwood Hwy, Grants Pass, supplying a return envelope, on July 30, 1987. Mr. Morgan's written response was received by the Agency on August 8, 1987.

63) Mr. Morgan's letter recited that he responded to the Employment Division job announcement in early March 1987; that he was interviewed by the Contractor, who explained the "partner" arrangement, which made the workers liable for their own taxes, social security, etc.; and that it would be a 40-hour, five-day week, at $9.25 per hour, "plus shares of excess."

64) Mr. Morgan's letter stated that no shares of proceeds were received, that workers actually averaged 20 to 25 hours per week, and that the promised first six weeks of food was inadequate, as were the sanitary facilities and first aid provisions. He stated that the contract he had signed was never "filed" (i.e., with the USFS), and that the one signed in 1986 remained on file without adding the 1987 signers.

65) Mr. Morgan's letter alleges that "The new hires * * * were employees and in fact two people were fired * * *" and that the ferry cost was "unvoluntarily" taken out of the workers wages.

66) On occasion, the Employment Division consults with the Agency concerning whether a particular job order is in conformity with laws enforced by, and the regulations of, the Agency. The Employment Division does not inquire whether a particular person placing an order is licensed for the type of work involved.

67) On October 27, 1987, the USFS Contracting Officer, Marie Brandt, received a letter from Steven Priddle, P.O. Box 444, Goldfield, NV., 89013, alleging wages owed him by the Contractor as the result of work on Zarembo Island in 1986.

68) Ms. Brandt referred the Priddle letter to the US Department of Labor (USDOL), since by October 1987 the USFS's dealings with the Contractor were closed.

69) Mr. Priddle's letter also claimed wages owed for an earlier period of employment with the Contractor in California prior to March 1986. He further claimed an interest in equipment acquired by the Contractor in Alaska, but stated that his main concern was unpaid wages.

70) Mr. Priddle's Alaska claim alleged payment of $3875 in wages with $463.80 owed. In addition he claimed "[a] total of 249.00 to return to the lower 48 also 100.00 was paid out on equip."

71) Mr. Priddle was not present at hearing. The available records do not verify the hours necessary to sustain the amounts claimed; no other evidence was presented on this subject.

72) Although he did not testify to wages owed, apparently Mr. Varga, prior to May 2, 1988, made a claim for unpaid wages against the Contractor through the USDOL. In a letter dated May 10, 1988, the USDOL, Portland, Oregon, advised Mr. Varga that the Contractor had agreed to pay back wages by July 20, 1988, in the amount of $489.23.

73) The Contractor borrowed funds on real property in 1986 and again in 1987 to provide capital for the Alaska contract completion. Both agreements signed in Alaska acknowledged that the funds advanced by the Contractor were to be repaid from the USFS contract proceeds prior to any distribution other than wage draws.

74) The Contractor reported adjusted gross income for 1986 to the Internal Revenue Service on IRS form 1040 as $ 1,391, with gross receipts of $63,950 and operating costs of $39,042, including $25,081 as reported on IRS 1099 forms. Other business expenses totaled $ 24,820.

75) The Contractor reported adjusted gross income for 1987 to the Internal Revenue Service on IRS form 1040 as $21,986, with gross receipts of $100,118 and operating costs of $31,469, including $31,469 as reported on IRS 1099 forms. Other business expenses totaled $50,354.

76) Included among business expenses on the Contractor's tax returns were repayment of the mortgage loans, as well as equipment expenses.

77) Mr. Varga testified that he was originally offered employment in March 1986 by telephone from the Contractor's home in Grants Pass, Oregon, to Mr. Varga at his father's house in Grants Pass, Oregon. The Forum disregarded this testimony because it was inconsistent with the evidence of the ongoing discussion and negotiation concerning a USFS job in Alaska prior to the end of 1985, and with evidence that Mr. Varga was an intended "partner" in late December 1985 or early January 1986. Mr. Varga testified that Morgan asked the Contractor for a copy of the agreement Morgan signed. Mr. Varga was unable to testify when this request occurred, except that it was not in 1986. Of necessity, it was prior to mid-May 1987. Mr. Varga's testimony was that it was in June or July, or perhaps June, but before he quit, either May or June. He testified that he did not recall the Contractor's reaction, or what exactly was said. Mr. Varga testified that he asked for an accounting, that he never witnessed anyone else request an accounting, and that his request seemingly upset Mr. Williams. Mr. Varga could not remember exactly when he made this request. He testified that his personal expectation of profit in 1986, from the original "partnership" agreement in 1986, was $18,000. The Forum finds this inconsistent with the admitted number of "partners" (six) who expected to share the anticipated net profit of $90,000. Unaccountably, he failed to testify to any wages allegedly still owed to him by the Contractor. His oral testimony was to the effect that he was paid $9.28 per hour for the hours he worked, despite having received the USDOL letter on May 10, 1988 (see Finding of Fact 72). Mr. Varga's demeanor and the manner and

content of his testimony, characterized as it was by vagueness, poor memory, and an apparent intent to paint the Contractor as a scheming opportunist, lead the Forum to give credibility to Mr. Varga's testimony only in those instances where other evidence or testimony provides corroboration.

78) The Contractor testified at times in an evasive, confrontive manner. His testimony was characterized by apparent resentment of the proceeding, as well as by either a calculated or a genuine misunderstanding of the issues. He did himself no service by being unrepresented by counsel. While his attitude detracted somewhat from his credibility, the Forum concludes that, overall, his testimony was credible, at least where it was uncontroverted by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) The Contractor was licensed as a farm labor contractor, employing persons for the purposes of forestation and reforestation, for the license years 1984 and 1985, and did business as Williams & Clan Forest Improvement, a sole proprietorship.

2) The Contractor was unlicensed in Oregon as a farm/forest labor contractor between January 31, 1986, and April 1, 1988.

3) During the 1985 license year, the Contractor recruited and solicited in Oregon workers to perform tree thinning labor outside this state in connection with a successful bid on a tree thinning contract with the US Forest Service to be performed on Zarembo Island near Wrangell, Alaska.

4) During 1987, the Contractor recruited and solicited in Oregon workers to perform tree thinning labor outside this state in connection with the Zarembo Island contract.

5) In his search for workers on said contract, both during the 1985 license year and in 1987, the Contractor represented the working arrangement as a "working partnership" involving the equal sharing of net profits after expenses.

6) In 1986, the anticipated expenses were to include transportation to and from the work site from Southern Oregon, food and camp expense, a reserve for future co-partner contracts, and a draw of $9.28 per hour actually worked.

7) In 1987, the anticipated expenses included transportation to and from the work site from Southern Oregon, excepting the ferry fare from Seattle to Wrangell, Alaska; they included limited food expense for the first six weeks, camp expense, and a draw of $9.28 per hour actually worked.

8) In both 1986 and 1987, the anticipated expenses also included repaying the Contractor's loan(s) incurred in furnishing capital, including tools and equipment, for the venture.

9) The Contractor filed a USFS form, "Statement of Partnership," with the USFS on or about January 2, 1986, signed by himself and by Leonard D. Williams, II, Joe Wallace, and James Watkins.

10) This form did not include the signatures of two other original members of the enterprise, Dennis M. Varga and Steve Priddle, because both were unavailable for signature on January 2, 1986.

11) All six signed an agreement in Wrangell, Alaska, encompassing the anticipated expenses and draw arrangement described in Ultimate Findings number 6 and 8 above.

12) Work on the USFS contract began in April 1986. It was to be completed within 200 days.

13) During the course of the summer and early fall of 1986, it became apparent that the contract could not be completed within the allotted time, due principally to an inadequate number of workers.

14) Four of the original six members of the enterprise (two had quit) worked until late October 1986 and returned to Oregon.

15) The USFS allowed the contract to be completed in 1987, partly in a default status, based upon the limited improvement in progress in 1986.

16) The Contractor searched in Oregon between November 1986 and mid-March 1987 for more workers to complete the USFS contract during the 1987 season. He did this by both oral and written invitation.

17) Several more individuals signed an agreement in Wrangell, Alaska, in March 1987, encompassing the anticipated expenses and draw arrangement described in Ultimate Findings number 7 and 8 above. Varga signed this second agreement.

18) One of the 1987 members of the enterprise, Joe Morgan, contacted the Contractor as the result of a job order placed by the Contractor with the State of Oregon Employment Division, Grants Pass, Oregon, in early March 1987. He was told that the object of the enterprise was the completion of the 1986 USFS contract in a "partnership," with the net proceeds after deduction of draws and expenses to be divided equally among the participants; the Contractor would furnish transportation from Grants Pass to Seattle; each participant was to furnish his own transportation from Seattle to Wrangell, then the clan boat would take the participants to Zarembo Island; each was responsible for his own food, after the first six weeks; and each would draw $9.28 per hour for each hour he worked.

19) The Contractor, both orally and in writing, recruited and solicited Mr. Morgan in March 1987.

20) In both 1986 and 1987, the USFS dealt with the Contractor, Leonard D. Williams, or, in his absence, with Leonard D. Williams, II, or Joe D. Wallace, whomever was on the job site at the time. This was in accordance with USFS operating procedures, and was authorized by all signers of both of the documents signed in Wrangell.

21) In both 1986 and 1987, Contractor or Leonard Williams, II, or Joe Wallace determined the daily work site.

22) Both the 1986 and 1987 agreements provided that each participant would pay his own insurance and withholding, was liable for his own injuries, and that "Williams and Clan copartnership" was not liable for any debts incurred by any partner. Printed provisions regarding the keeping of books and inspection thereof by any partner, and regarding restrictions on the execution of notes or sureties, were stricken or noted as "NA."

23) Both the 1986 and 1987 agreements provided that if any partner

withdrew, i.e., quit, prior to the completion of the USFS contract, he thereby accepted his hourly draw to date as his share of the agreement. Also, if a majority of the participants agreed that one was not performing adequately or was causing friction or tension, he must withdraw and accept the hourly draw to date as his share.

24) At least four of the 1987 members of the enterprise, including Morgan and Varga, discontinued work in mid-May 1987.

25) The Contractor filed individual federal income tax returns for 1986 and 1987; no partnership returns were filed.

26) The USFS contract was completed in a default status in October 1987. This resulted in the USFS withholding $1520 ($10 per day for each day beyond the allotted contract time) from the contract payments.

27) The Contractor took reimbursement from the USFS contract payments for most of the described advances or capital outlays. The records available to the Forum do not reflect that the Contractor credited himself with $9.28 per hour for hours worked.

28) All other participants in 1986 and 1987 received $9.28 per hour for hours worked. There were no profits distributed to any of those participating in either the 1986 or 1987 seasons.

29) The records and evidence available to the Forum do not establish that a distributable profit resulted from the enterprise.

CONCLUSIONS OF LAW

1) ORS 648.405 to 658.485 provides that the Commissioner of the Bureau of Labor and Industries shall administer and enforce those sections. The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the person and subject matter herein.

2) ORS 658.405 provides in part:

"As used in ORS 658.405 to 658.485 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, the clearing, piling and disposal of brush and slash and other related activities * * *; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; * * *."

OAR 839-15-004 provides in part:

"As used in these rules, unless the context requires otherwise:

"* * *

"(5) 'Forest Labor Contractor' means

"a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

"b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands; * * *.

"* * *

"(7) 'Forestation or reforestation of lands' includes, but is not limited to:

"a) the planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings; * * *.

"* * *

"(13) 'Worker' means any individual performing labor in the forestation or reforestation of lands * * *. A 'worker' includes, but is not limited to employees and members of a cooperative corporation."

ORS 658.410(1) provides in part:

"No person shall act as a farm labor contractor with regard to forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1) * * *."

ORS 658.415(1) provides in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.485 * * *."

ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.485, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands * * *."

Contractor, in March 1987, while not licensed as a farm/forest labor contractor, recruited and solicited in Oregon workers to perform tree-thinning labor in violation of ORS 658.410(1) and 658.415(1).

3) ORS 658.440(2) provides in part:

"No person acting as a farm labor contractor, * * * shall:

"* * *

"(b) Willfully make or cause to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person."

Contractor represented to the person recruited that the conditions of employment were to be a partnership involving Contractor, the person recruited, and several other individuals; Contractor did not violate ORS 658.440(2).

4) ORS 658.440(1) provides in part:

"Each person acting as a farm labor contractor shall:

"* * *

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Contractor did not violate ORS 658.440(1).

5) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries, in the same manner as provided in ORS 183.310 to 183.550 for a contested case proceeding, may assess a civil penalty not to exceed $2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.485, recruits, solicits, supplies or employs a worker.

"* * *

"(c) A farm labor contractor who fails to comply with ORS 658.440(1)(d), * * * (2)(b), * * *.

"* * *

"(e) A farm labor contractor who fails to comply with ORS 658.417(1) * * *."

OAR 839-15-510(1) provides in part:

"In determining the amount of any civil penalty to be imposed, the Commissioner, [or designee] will take the following factors into consideration:

"* * *

"(4) The civil penalty for acting as a Farm Labor Contractor without a license containing a special indorsement thereon, shall be as follows:

"(a) Up to $500 for the first offense; * * *"

Under the facts and circumstances of this record, in accordance with ORS 658.420 and related portions of ORS 658.405 to 658.475 and of Oregon administrative rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein.

OPINION

Acting As A Farm Labor Contractor Without A Farm Labor Contractor's License

The Agency's Notice of Intent To Assess Civil Penalty charges Leonard D. Williams, dba Williams & Clan, with acting as a farm labor contractor without a farm labor contractor's license in that he allegedly "recruited, solicited, supplied and/or employed workers in Oregon to perform tree thinning labor in the State of Alaska by placing a job order with the Oregon Employment Division on or about March 3, 1987, when * * * Contractor was not licensed as a farm labor contractor, * * *."

The Contractor has admitted, and the evidence shows, that he was not licensed as a farm labor contractor in Oregon between January 31, 1986, and April 1, 1988. The Contractor has admitted, and the evidence shows, that he placed a job order on March 3, 1987, with the Grants Pass office of the Oregon Employment Division for workers for tree-thinning labor in Alaska. The question then becomes whether these two admitted and demonstrated facts, in combination, amount to a violation of ORS 658.410(1) and 658.415(1), both of which prohibit acting as a farm labor contractor without a license.

A person acts as a farm labor contractor if the person "recruits, solicits, supplies or employs" a worker for the purpose of forestation or reforestation of lands. Such activity by a person without a farm labor contractor license must take place in Oregon in order for there to be a violation. The Contractor argues that, since the work for which he sought personnel was to be performed in the State of Alaska, the provisions of ORS chapter 658 did not apply, and the Commissioner is without authority to impose any sanction on his alleged farm labor contractor activity. Second, the Contractor argues that since he sought partners, rather than employees, the prohibition against finding "workers" without a farm labor contractor's license did not apply.

The Agency's position is that the Commissioner's authority is based on the acts of recruitment or solicitation taking place in Oregon, and that offering individuals so recruited the status of "partner" would not remove the necessity for the required license.

To deal with the Contractor's second argument first, the Forum finds, in accordance with OAR 839-15-004(13), that "worker" includes employees and members of any cooperative or profit-share arrangement, as well as of a cooperative corporation, and means any individual performing labor in the forestation or reforestation of lands.

The Forum finds that "to recruit," within the context of the statute, means to seek a worker or workers for the purpose of establishing a direct employer-employee relationship, or to seek a worker or workers for the purpose of establishing a work relationship wherein the person sought, while initially seeking employment, eventually is intended to enter into a cooperative or profit-share arrangement with the person or persons seeking workers.

The Forum further finds that "to solicit," within the context of the statute, means to actively try to obtain, to ask earnestly for, to proselyte or attempt to persuade a worker for, or to appeal to a worker for, the services of the worker in order to establish either a direct employer-employee relationship or a cooperative or profit-share arrangement. To recruit, then, means to advertise or give notice of, either orally or in writing, employment availability and the steps necessary to obtain it, and it might also include persuasion. To solicit, for the purpose of ORS 658.405 to 658.485, encompasses recruitment and necessarily includes an element of serious offer or persuasion.

Thus, by placing the job order with the Employment Division in March 1987, the Contractor "recruited" within the meaning of the statute. In offering to Morgan the Alaska employment with assurance of $9.28 an hour and the added inducement of a share of any net profit, over and above the hourly wage, the Contractor "solicited" within the meaning of the statute.

The fact that the forestation or reforestation work was in the State of Alaska is not material. ORS 658.405 to 658.485 was enacted to protect workers in Oregon from all unlawful employer activity in the forestation/ reforestation field. Allowing unlicensed recruitment in this state on the basis of job location outside Oregon would not accomplish this purpose. To recruit or solicit workers in Oregon to work in the forestation or reforestation of lands, wherever situate, is a forest labor contractor activity requiring a valid farm

labor contractor license with appropriate indorsement.

Similarly, allowing unlicensed recruitment or solicitation where the eventual work relationship may be a purported partnership or profit-share arrangement would not protect workers in the manner intended. To recruit or solicit workers in Oregon to work in the forestation or reforestation of lands, whether for the purpose of establishing a direct employer-employee relationship or a profit-share or partnership relationship, between the person being sought and another, including the recruiter, is a forest labor contractor activity requiring a valid farm labor contractor license with appropriate indorsement. Such activity without such a license is a violation of ORS 658.410(1) and 658.415(1).

Willfully Making A False, Fraudulent, or Misleading Representation

The Agency's Notice of Intent To Assess Civil Penalty also charges Leonard D. Williams, dba Williams & Clan, with willfully making a false, fraudulent, or misleading representation concerning the terms, condition, or existence of employment in representing

> "to certain workers recruited through the Oregon Employment Division that they would become part of a cooperative partnership with Contractor on work solicited by Contractor with the United States Forest Service in the State of Alaska and that they would receive profit-sharing, food and transportation costs as part of said cooperative partnership, when in fact Contractor did not comply with any such representations, a violation of ORS 658.440(2)(b)."

To willfully make a false, fraudulent, or misleading representation concerning the terms, condition, or existence of employment must mean: first, that the representation in question is false or fraudulent or misleading (or any combination thereof); and second, that it was made willfully, that is, knowingly, intentionally, and with free will.

The willfulness is not at issue unless there is first established a representation that is false or fraudulent or misleading. This Forum's definition of "willful" is contained in *In the Matter of Sheila Wood*, 5 BOLI 240 (1986).

While "false, fraudulent or misleading" may in some instances appear to be interchangeable, or synonymous, the Forum assumes that the Legislature intended differentiation rather than redundancy. The general meaning of the terms, while closely allied, places them on a continuum of deception:

> (a) "false" generally means that the questioned representation is untrue (legally, it may also include a connotation of intentional deception);
>
> (b) "misleading" generally means that the questioned representation is calculated or intended to lead astray or to lead into error, and may assume the speaker's knowledge of the truth, or at least of the inaccuracy of the representation;
>
> (c) "fraudulent" generally means that the questioned representation is untrue, is known to the speaker to be untrue, and is made with the specific intent that the hearer act on it to the hearer's (legal) injury.

The Agency's position is that in interesting persons in working at the tree-thinning venture in Alaska, the Contractor knowingly and intentionally misrepresented the nature of the enterprise by calling it a partnership when, in fact, he intended that the persons recruited would be his employees with no true opportunity to share such funds as might remain after acknowledged expenses, including draws based on labor performed.

While much evidence and testimony was devoted to the initial recruitment in late 1985, the 1986 mode and method of operation, and the written 1986 agreements, the Determination Order over which the hearing was held contained an administrative investigative finding that such false, fraudulent, and misleading representations were made "to certain workers recruited through the Oregon Employment Division." Since the evidence shows that the Employment Division was involved only in 1987, this charge must be confined to that time. The representations concerned the worker(s) becoming part of a cooperative partnership with Contractor in Alaska, where "[t]hey would receive profit-sharing, food and transportation costs as part of said cooperative partnership, when in fact Contractor did not comply with any such representations * * *." The Agency contends that these representations were false, fraudulent, and misleading, and seeks a civil penalty of $1,000, or $500 each for the representations made to Mr. Varga and to Mr. Morgan. The evidence does not support that Varga was recruited through the Oregon Employment Division, nor is there evidence that he was recruited at all in 1987. His participation in the 1987 season appears to have been an extension of his 1986 involvement. He was aware that the USFS contract had not been completed as originally anticipated and that any agreement he signed in 1986 had, as a result, not been completed as originally anticipated, and could conceivably be subject to some revision. The question involves whether, when the Contractor represented to Morgan, as the Contractor admits he did, that the arrangement was a partnership, the Contractor actually intended otherwise.

Thus, whatever inaccuracy the Contractor introduced into his solicitation of this worker for the Alaska enterprise either must have been known to the Contractor at the time to be not true (i.e., false), or must have been intended to deceive (i.e., mislead), or in the case of an intentional deception, must have been for the purpose of inducing the candidate to act to his own (legal) injury (i.e., fraudulent). In this case, the injurious act would be to join the enterprise in the expectation of profit beyond mere wages when, in fact and known to the Contractor, no such profit existed or, if it existed, it was not intended to be shared with the worker. The Agency must establish such a motivation by a preponderance of the evidence. For ease of discussion, this opinion will use the word "misrepresentation" to include the concept of "false, fraudulent or misleading."

By way of argument, the Agency points out that the Contractor's early bid on the project appears to be as a

sole proprietorship and is inconsistent with the claim of a partnership. Whatever weight this argument may have had, it is erased by the notification to the USFS that the "Williams & Clan" with which it was dealing was a partnership entity.

The Agency's principal position respecting the misrepresentation issue is that the arrangement proposed and implemented for the completion of the USFS contract in Alaska by the "Williams & Clan co-partnership" was not a partnership, although so represented, because it did not possess the necessary legal elements of a partnership entity. Among these, citing the 1986 agreement as an illustration of the Contractor's true intent, were:

A) That the purported partners did not share in the capitalization, all of the assets being provided by the Contractor;

B) That the purported partners were paid wages, rather than some proportionate share of the entity's earnings;

C) That the Contractor retained a large portion of the earnings to reimburse his expenses and finance future bids;

D) That the purported partners could avoid any future partnership liability simply by quitting the enterprise;

E) That the sharing of partnership liabilities among the several purported partners was not a feature of the agreement;

F) That taxes and insurance were individual, rather than partnership, concerns.

Further, as to the 1987 agreement, the Agency cites:

G) That this new agreement excluded the $90,000 profit-share of the first;

H) That the Contractor breached his partnership duty of disclosure to his co-partners by not revealing the loss of profit-sharing and the potential of default;

I) That the second agreement was for the purpose of eliminating the profit-share, even though the Contractor's investment was protected by the original amount set aside for reimbursement and future financing;

J) That the Contractor failed to advance transportation costs;

K) That any new "partners" were to be approved by a vote of the current partners, but the Contractor added nine persons without consent of his purported partners.

Finally, the Agency asserts as policy the Uniform Partnership Law, (UPL) adopted as ORS 68.010 to 68.650, which defines a partnership as:

"[A]n association of two or more persons to carry on as co-owners a business for profit."

The UPL defines certain elements which must be present in order for an entity to qualify as a partnership:

1) Each member must initially contribute capital or property to the entity.

2) Profits and losses should be shared equally.

3) Partners are not paid wages for pursuing partnership business.

4) Each has coequal rights of management, including admitting new partners.

5) Books regarding profits, losses, property, etc. must be kept and be accessible to each partner.

6) Each member must disclose true information demanded by a co-partner.

7) Each owns any declared surplus or profit and is a co-tenant of partnership property.

8) Dissolution of the arrangement must be consistent with the partnership purpose.

9) A partner receiving money or value in the partnership name must account for it and account at dissolution for liabilities and/or surplus.

10) Each member has a right of action against another member who breaches the partnership purpose.

The Forum believes that a detailed examination of partnership law is not determinative of the issue of whether the 1987 recruits, specifically Morgan, were led into the enterprise by misrepresentations on the part of the Contractor. The Forum sincerely doubts, and there was not evidence to show, that Morgan or any other member of the enterprise, including the Contractor himself, understood the ramifications of the terms "partner," "partnership," or "co-partnership." What was understood was that the Contractor, subject to repayment from contract proceeds, would advance certain living, transportation, equipment and operating expenses, while also paying a minimum guarantee per hour worked, also out of contract proceeds. This was substantially what occurred. The Contractor testified that the limited advance of six weeks food was explained to Morgan. There is no evidence that this was not explained to Morgan, who complained that "Williams also promised to supply food for an adequate diet for the first six weeks," and allegedly did not. The signed agreement for 1987 confirms the Contractor's version. There is not credible evidence that the Contractor, in March 1987, represented to Morgan that there was an expectation of a specific amount over the guaranteed draw, that all transportation or any food beyond six weeks would be advanced, either against the contract proceeds or by the Contractor personally, or that Morgan's expectation beyond the hourly draw included a share of the equipment. Neither is there credible evidence that the Contractor knew, or should have known, in March 1987, that there would be no profit at all. He knew of the default status. There was no showing this was discussed in recruitment, nor is there any evidence that it was intentionally avoided, or actively misrepresented.

There is evidence from which to conclude that the profit-sharing plan, plagued as it was by weather, inadequate personnel, sporadic work schedules, etc., all of which could result in more than doubled transportation, living, equipment operation, and staffing expenses, simply wound up with no profit to share.

The Agency relies upon certain specific factual arguments:

A) Only the January 1986 document was known to or filed with the Forest Service.

The affidavits of the Contracting Officer and of the Contracting Officer's representative each state that the respective affiant has no recollection of telling the Contractor that he was not required to file an updated partnership statement or agreement to supplement the document of January 2, 1986. Neither indicates that such advice would be contrary to regulation or practice. An affidavit of non-recollection is insufficient to overcome the Contractor's sworn testimony that he was told an up-date was not required.

B) The January 1986 document filed with the Forest service was signed only by Contractor and members of his immediate family.

The Contractor testified to his belief that such information was included in the five-day deadline in the USFS letter of December 18, 1985. The letter could be read that way. He further stated that the non-availability of Mr. Priddle and Mr. Varga, coupled with this perceived need for haste, prompted him to submit the partnership statement as it appears. No contrary testimony was offered, and the Contractor's transmittal letter to USFS acknowledged that "two partners were not available at this time." There is insufficient evidence of Contractor's control over the day-to-day operation of the enterprise. That evidence which exists is easily explained by the agreement that he was the "managing partner," which was understood by all concerned, including the USFS, which preferred to deal with the authorized partner.

C) Contractor failed and refused to render an accounting, or copies of the agreements, to members of the enterprise when requested.

It is unclear whether an accounting was requested. As for copies of the agreement(s), the Contractor pointed out the lack of copying facilities at the work site. It is also unclear whether the Contractor ever represented to the signers of either agreement that it had been filed with the USFS.

D) The "partnership" arrangement was a device to disguise the employer-employee relationship and to avoid withholding of income tax, social security, and similar employer responsibilities.

The participants agreed to the independent nature of their status as to withholding, social security, insurance, and the like. Again, the written agreement signed by the participants, Varga's description of this aspect, and Morgan's letter, (as well as those of Wallace, Shippy, and L. Williams, II) leave no doubt that all understood this condition. No disapproval was voiced until it became apparent that circumstances had probably eliminated the hoped for profit, or members had quit and realized there were no unemployment benefits.

E) There was some profit above the acknowledged expenses and that knowledge of this and of the sums involved was calculatedly withheld from the workers, or at least from those not members of Contractor's immediate family.

The Agency's position in this regard is entirely speculative; there was no proof of any profit to be distributed under the terms of the agreement(s) as they were understood by the participants.

F) Contractor filed an individual, rather than partnership, federal income tax return for 1986 (and, again, for 1987).

This is the most telling of the Agency's accusations. It is apparent that the 1986 return, due in April 1987, was prepared as if the Alaska venture were a proprietorship. While it is understandable, none of the "partners" had received a distribution beyond wages, nor had they, according to the evidence, invested anything beyond their labor -- it is inconsistent with the partnership claim. Standing alone, however, it is insufficient evidence upon which to base a finding that the Contractor, in offering shares of any profit resulting from the as yet uncompleted contract, really intended that the remaining unearned contract payments would be treated as his individual personal income. While this is eventually what occurred, the 1986 return is a mere inference. From that alone, it cannot be further inferred that the Contractor's intent in early 1987, before the return was due, before the contract was completed, and before a number of the participants withdrew, was to operate as a sole proprietorship.

None of these contentions, singly or in combination, constitute the alleged violations.

Failure to Comply With the Terms and Provisions of a Legal and Valid Contract

The Agency, pursuant to the Forum's ruling following the hearing, amended the charging document under OAR 839-30-075. As amended, it charged that Contractor failed to comply with the terms and provisions of a legal and valid contract entered into as a farm labor contractor, in violation of ORS 658.440 (1)(d), for which the Agency sought a penalty of $500. This was intended as an alternative to its charge of willfully making a false, fraudulent, or misleading representation concerning the terms, condition, or existence of employment, if the latter charge was not sustained. Further, the "Legal and Valid Contract" referred to was specifically identified as that between Williams & Clan and the US Forest Service in 1986 in Alaska.

The Agency relies on Forum's precedent from *In the Matter of Francis Kau,* 7 BOLI 45 (1987). In that case, the contractor failed to complete his contract with the US Forest Service within the time required by the contract terms. Combining this with other failures to comply with the contract's terms, the USFS, after granting two time extensions for completion, terminated the contract. The Commissioner found this failure to comply with the legal and valid contract with the USFS was an element of a violation of ORS 658.440(1)(d) for which a penalty was assessed. The situation in this case is quite different. Here, Williams & Clan completed the contract with USFS during its first extension of time in a manner satisfactory to the USFS, which imposed its own sanction short of termination to address the late completion. The Forum finds no violation in this regard.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Contractor is hereby ordered to deliver to the Business Office of the Bureau of Labor and Industries, Room 305, 1400 SW

Fifth Avenue, Portland, Oregon 97201, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE HUNDRED DOLLARS ($500) plus any interest thereon which accrues at the annual rate of nine percent between a date ten days after the issuance of the Final Order herein and the date the Contractor complies therewith. This assessment is a civil penalty against the Contractor for his violation of ORS 658.410(1) and 658.415(1) found above.

In the Matter of

HARRY S. MARKWELL, M.D.,

Respondent.

Case Number 35-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 11, 1989.

SYNOPSIS

Complainant, a nurse who had cooperated with an Accident Prevention Division investigation by giving the inspector interviews and showing him how she performed her job, voluntarily quit her employment with Respondent. Thus, although Complainant exercised rights afforded by the Oregon Safe Employment Act, Respondent did not discharge her because of that. The Commissioner ruled that damages for mental suffering may awarded in a case alleging a violation of ORS 654.062(5), and that a preponderance of the evidence is the burden of persuasion in Agency administrative hearings. ORS 654.003, 654.062(5); OAR 437-01-025, 839-06-040.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 17 to 20, 1989, in Room 220 of the State Office Building, at 165 E. 7th Street, Eugene, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Linda Lohr, an employee of the Agency. Delores Ann Renard King (hereinafter Complainant) was present throughout the hearing. Harry Stuart Markwell, M.D. (hereinafter Respondent) was represented by P. Scott McCleery, Attorney at Law. Respondent was present at the hearing on May 17 and 18, 1989.

The Agency called the following witnesses (in alphabetical order): Nita Barkelew, former employee of Respondent; Ernest Delco, Jr., Parole and Probation Officer, Department of Corrections; David Gerry, Occupational Health Specialist/Industrial Hygienist, Accident Prevention Division, Department of Insurance and Finance; Delores King, Complainant; James King, Complainant's husband; Becky S. Miller, R.N., Oregon State Board of Nursing; John Nilsen, Parole and Probation Officer, Department of Corrections; Harold Rogers, Senior Investigator, Civil Rights Division of the Agency; Martha Skiff, L.P.N., former employee of Respondent; and Jean Skinner, former employee of Respondent.

Respondent called the following witnesses (in alphabetical order): Darryl Alosa, Personnel Office, Sacred Heart Hospital; Mary Berry; Jeanette Bueford, Lane County Medical Society Placement Service; Susan Coven, R.N., current employee of Respondent; Naomi Fish, Director of Clinic Nursing, Eugene Hospital and Clinic; Nora Glenn, Manager of Fred Meyer Pharmacy in Santa Clara; Harry Stuart Markwell, M.D., Respondent; Kristine Markwell, Respondent's wife and accounts payable clerk; Barbara Murry, Respondent's office manager; Detective Don Norenberg, City of Eugene; Diann Powrie, R.N., Nurse Consultant.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Ruling, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING

At hearing, Respondent moved to strike a claim in the Specific Charges for damages for mental suffering. As set forth in his Hearing Memorandum, Respondent pointed out that ORS 654.062(5) and its federal law counterpart, 29 USC 660(c), have identical language with respect to remedies, namely

> "all appropriate relief including rehiring or reinstatement of the employee to the employee's former position with back pay."

Respondent asserted that no Oregon case has considered this language, and that of the numerous federal cases that have considered the federal language, none has held that it allows either a court or the Commissioner to award compensatory or punitive damages. He argued that the specifications in ORS 654.062 regarding the remedies of reinstatement and back pay limit the relief available under the statute. Finally, he argued, the Oregon Supreme Court has held that neither general damages nor punitive damages are recoverable under federal Title VII or ORS chapter 659, citing *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 689 P2d 1292 (1984); and similarly, compensatory damages were not recoverable under "the Oregon Act" (ORS 654.062) since it has been widely recognized by the federal courts that the remedies under 19 USC 660(c) are the same as those allowed under Title VII.

The Agency pointed out in response that ORS 654.062(5)(b) states that an employee may, under ORS 659.040, file a complaint with the Commissioner alleging a violation of ORS 654.062(5) and:

> "[u]pon receipt of such complaint the commissioner shall process the complaint and case under the procedures, polices and remedies established by the ORS 659.010 to 659.110 and the polices established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color,

national origin, sex or age under ORS 659.030(1)(f)."

The Agency also pointed out that compensatory damages are recoverable under Oregon's civil rights law, citing, among other cases, *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, *rev den* (1979).

Respondent's motion to strike is denied.

It is well settled that the Commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. *Williams v. Joyce,* 4 Or App 482, 504, 479 P2d 513, 523, 524, *rev den* (1971); *School District No. 1 v. Nilsen,* 271 Or 461, 484-86, 534 P2d 1135, 1146 (1975); *Fred Meyer, Inc., v. Bureau of Labor, supra; Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668, 670-71 (1980); *City of Portland v. Bureau of Labor and Industries,* 298 Or 104, 690 P2d 475, 484 (1984); *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339, 1342-43, *aff'd,* 308 Or 199, 778 P2d 953 (1989). *See also* OAR 839-03-090.

As the court stated in *Schipporeit,* the legislative history of ORS 659.121, which provides for civil suits in circuit court, does not show:

> "any intention to abrogate the previously existing powers of the Commissioner recognized in *Williams v. Joyce, supra.* In *Holien,* the Supreme Court concluded that the 1977 legislation did not eliminate or reduce existing administrative remedies, including damages, in employment discrimination." 93 Or App 12, 760 P2d at 1341.

Thus, Respondent's reliance on *Holien* is misplaced. The Supreme Court has specifically recognized the Commissioner's power to award mental suffering damages under the Oregon civil rights law.

The language of ORS 654.062 (5)(b) that "all appropriate relief including rehiring or reinstatement of the employee to the employee's former position with back pay" does not limit the types of relief to only those named remedies. The Commissioner has the authority to fashion a remedy adequate to eliminate the effects of discrimination. In *Fred Meyer* the court said,

> "[t]he wide variety of forms which discrimination may take, the broad range of circumstances in which it occurs, and the differences in the impacts it has on particular individuals require that the Commissioner's remedial powers be broad and flexible." 592 P2d at 570.

ORS 654.062(5)(b) states that:

> "the commissioner shall process the complaint and case under the procedures, polices and <u>remedies</u> established by the ORS 659.010 to 659.110 and the polices established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f)." (Emphasis added.)

This Forum knows of no policy established by ORS 654.001 to 654.295 and 654.750 to 654.780 that limits the Commissioner's remedial powers. Thus, the Commissioner "shall" process the case with the same remedies established by the civil rights law "in the same way and to the same extent that the complaint would be processed * * * under ORS 659.030(1)(f)."

The Commissioner has previously awarded mental suffering damages in a case involving retaliation under former ORS 659.030(4), now renumbered ORS 659.030(1)(f). The Court of Appeals and the Supreme Court of Oregon affirmed that decision on damages for retaliation. *City of Portland v. Bureau of Labor and Industries,* 64 Or App 341, 668 P2d 433, *aff'd,* 298 Or 104, 690 P2d 475, 484 (1984).

Accordingly, the Commissioner may award general damages for mental suffering in a case alleging a violation of ORS 654.062(5), and she has done so in four earlier Orders. *See In the Matter of Peggy's Cafe,* 7 BOLI 281, 288-89 (1989); *In the Matter of Associated Oil Company,* 6 BOLI 240, 257-58 (1987); *In the Matter of Scottie's Auto Body Repair, Inc.,* 4 BOLI 283, 314 (1985); and *In the Matter of PAPCO, Inc.,* 3 BOLI 243, 253 (1983).

FINDINGS OF FACT – PROCEDURAL

1) On or about April 13, 1988, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that she was the victim of an unlawful employment practice of Respondent, in that, effective April 1, 1988, Respondent terminated Complainant in retaliation for her participation in an Accident Prevention Division (APD) inspection of Respondent's medical office.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice, under ORS 654.062, by Respondent.

3) The Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On March 30, 1989, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent had discharged Complainant from employment because Complainant cooperated with agents of the Accident Prevention Division in the course of its investigation, which constituted an unlawful employment practice in violation of ORS 654.062(5)(a).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On April 19, 1989, Respondent filed an answer in which he denied the allegation mentioned above in the Specific Charges, and stated three affirmative defenses.

7) Pursuant to OAR 839-30-071, the Agency and Respondent each filed a Summary of the Case.

8) A pre-hearing conference was held on May 17, 1989, at which time the Agency and Respondent stipulated to certain facts. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

9) At the commencement of the hearing, Mr. McCleery stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

10) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) Respondent moved to amend his answer to correct three references to "Respondent" which should have read "Complainant" in paragraphs eight and nine. The amendments were allowed, and the answer was corrected by interlineation.

12) Before opening statements, Respondent moved to strike the part of the Specific Charges that was a prayer for mental suffering damages. Respondent submitted a hearing memorandum in support of his motion. The Agency requested an opportunity to submit a reply memorandum, and Respondent requested an opportunity to submit an addendum to his memorandum. The Hearings Referee reserved ruling on the motion at hearing, and allowed the Agency and Respondent to submit those memoranda. The hearing record remained open until May 30, 1989, to receive them. At the Agency's request, the deadline was extended one day until May 31, 1989. The Agency and Respondent each submitted timely documents. The ruling begins on page 81.

13) During the hearing, the Agency moved to amend the Specific Charges to conform the mental suffering damages requested therein to the evidence presented at the hearing. The motion was denied.

14) At the end of the Agency's case in chief, Respondent moved to dismiss the Specific Charges because the evidence failed to support the charges. The motion was denied. The Hearings Referee found that there was sufficient evidence on the record from which to establish a prima facie case of an unlawful employment practice in violation of ORS 654.062.

15) On June 30, 1989, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing. Pursuant to OAR 839-30-165, the Agency and Respondent had 10 days to file exceptions to the Proposed Order. On July 10, 1989, the Hearings Unit received the Agency's exceptions, which are addressed throughout this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent was a licensed physician who was an employer in this state utilizing the personal services of one or more employees.

2) At all times material, Complainant was a licensed practical nurse (LPN), and at the time of hearing she had been an LPN for nearly 22 years.

3) Complainant was employed by Respondent as an office nurse between September 1984 and April 1988.

4) Respondent interviewed and hired Complainant. She was trained by Respondent and Alice Mitchell, R.N., who was Respondent's office nurse at the time Complainant was hired. After training Complainant, Mitchell left Respondent's employment.

5) When she was fully trained, Complainant's duties included: mixing and administering cancer chemotherapy drugs; assisting, counseling and caring for patients; drawing blood from patients; scheduling appointments and tests for patients; refilling prescriptions; acting as a cashier; meeting with sales representatives; ordering supplies; filing; and cleaning offices, patient rooms, and bathrooms. As Complainant became fully trained, and after she had worked with Respondent several months and gained his trust, Respondent gave her more responsibilities.

6) Complainant worked full time. Her schedule, except as noted otherwise in this Order, was Monday though Thursday, from eight to 12 hours per day. She normally started work around 8 a.m., and quit around 7 p.m. Her beginning rate of pay was $6.50 per hour. She was receiving $7.75 per hour at termination. From June 1 to mid-December 1987, Martha Skiff worked as a part-time nurse for Respondent. After Skiff quit, Complainant worked Friday mornings. Complainant worked on average between 40 and 50 hours per week, and was paid her straight hourly rate for all hours worked.

7) During the time Complainant worked for him, Respondent's office practice grew. As it became busier, the stress level in the office went up for Respondent and all employees. Jean Skinner, Respondent's bookkeeper who started work in January 1986, noticed a stressful relationship between Respondent and Complainant within a few months of when she went to work. From the end of 1984 through 1986 Respondent was pleased with Complainant's performance. Complainant was given a $500 bonus.

8) Sometime in 1987, Respondent discovered Complainant "dry labbing CBCs," which means that, without running any tests on a patient's blood, Complainant made up false data about the blood count. Such data was what Respondent used to determine a patient's dosage of chemotherapy drugs. Respondent took Complainant into a room and "got very disturbed at her."

9) Sometime during the last half of 1987, in the "winter months," Complainant canceled a lecture about chemotherapy by Respondent at McKenzie-Willamette Hospital. During the afternoon before the lecture, Ms. Markwell called Complainant. She said that Respondent was tired and asked if the lecture could be rescheduled. Complainant called the hospital and the lecture was canceled. Respondent asked Complainant the next day why the lecture was canceled and Complainant told him that Ms. Markwell had requested it. Respondent became "adamant" that Ms. Markwell did not run his medical practice. Respondent asked Ms. Markwell if she had told Complainant to cancel the lecture, and she said she had not. Respondent was "very disturbed" at

Complainant for a couple of days, and "communications were very poor."

10) Marilyn Renard Arnison, Complainant's sister, had once been Respondent's patient. Sometime in November 1987, Arnison's current doctor called Respondent to ask him to refer Arnison to McKenzie-Willamette Hospital for a CAT scan. Respondent practiced at that hospital. Arnison needed a CAT scan immediately and her doctor could not schedule it at Eugene Hospital and Clinic. Respondent was not present to take the call, but Complainant told the doctor that Respondent's office could schedule the CAT scan at McKenzie-Willamette Hospital. This event was not the first time that Complainant had authorized the performance of a procedure on a patient at a hospital without first checking with Respondent. Complainant believed there was an "unspoken" understanding with Respondent about the limits of her discretion regarding refilling prescriptions and authorizing procedures. Respondent did not approve of Complainant's authorization of the CAT scan. Following this event, Respondent distrusted Complainant.

11) During November 1987, Complainant wanted to begin taking night classes to become a physician's assistant. Respondent told Complainant to reduce her work hours to 32 per week, which she did. Complainant applied for a job at Sacred Heart Hospital and was interviewed. Respondent wrote Complainant a letter of recommendation because "that's the way another person gets another job -- she needed another job," and because he felt that problems with communication, trust, and tension between him and Complainant had been building for six months. Respondent spoke with the interviewer from the hospital about Complainant and gave her a strong recommendation. Complainant heard nothing further. Complainant never took the classes because she needed full-time work. Respondent increased Complainant's hours to full-time after Skiff quit in mid-December 1987.

12) During December 1987 and in January 1988, Complainant was under stress both in her personal life and at work. Her stress negatively affected Respondent's office. Stress and burnout are common in people who work in the oncology branch of medicine, in part because of contact with terminally ill patients. Complainant would cry with cancer patients who were terminal and emotional. Skinner noticed that Respondent and Complainant "got on each others nerves." Complainant occasionally mentioned quitting during 1987. Respondent believed that since October 1987 Complainant's work hours were increasing while her productivity was decreasing. Respondent did not know why that was occurring because the communication was very poor between them. Respondent wrote her a memo in November limiting her hours.

13) Complainant's husband often came into the office and helped her finish cleaning up before he drove her home at night. Respondent and Ms. Markwell knew that Mr. King came into the office to help out. Near the holidays in December 1987, at around 7 p.m. one evening, Ms. Markwell went into the office and observed Complainant and Mr. King in Respondent's private office looking at papers on Respondent's desk. Ms. Markwell thought the papers had to do with Respondent's Individual Retirement Account (IRA), and she reported the incident to Respondent. Respondent told Ms. Markwell that he could not fire Complainant because, due to his workload around the holidays, he could not close the office and because she was the sole support for her family. Respondent had a lock installed on his private office door. Respondent did not talk to Complainant about the incident because their communication was poor and he expected her to deny it.

14) Martha Skiff worked as a nurse with Complainant from June to mid-December 1987. When she was hired Respondent told her that Complainant was burned out. Skiff never mixed cancer chemotherapy drugs, or administered them intravenously. She quit in December because she did not want to be exposed to the chemotherapy drugs and because Respondent offered no employee benefits. After Skiff quit, Complainant was Respondent's only nurse through April 1, 1988.

15) Flo Sirean was employed by Respondent as a lab technician during December 1987. She worked for Respondent for only a couple of days. Sirean reported Respondent to the Accident Prevention Division (APD) because she believed that Respondent's office was an unsafe and unhealthy work environment. She told Complainant that she believed office practices, such as needle disposal in plastic bags in open trash cans, were unsafe and that she had reported Respondent to APD. She called Respondent at home to discuss unsafe practices.

16) Pursuant to the complaint, on January 15, 1988, David Gerry of APD began an inspection of Respondent's office. Gerry interviewed Respondent and Complainant, and he watched Complainant demonstrate her duties, including mixing the cancer chemotherapy drugs. Gerry inspected Respondent's lab. He visited the office two more times and interviewed current and former employees.

17) Respondent was upset and frustrated by the APD inspection. He thought it was unfair because he believed that his office practices complied with usual, prevailing practice methods for oncology offices, and were safe. He did not believe that Gerry had the background to judge Respondent's practices. He found the investigation to be disruptive because he had to reschedule patients and could not use the lab when Gerry was in it. He asked Complainant and she told him what she told and showed Gerry. After Gerry's first visit, Ms. Markwell called to find out if Gerry had left and what Complainant had said to him. Ms. Markwell told Complainant to be careful about what she said. Respondent instructed Complainant to cooperate with the investigation.

18) Respondent asked Complainant if she had reported Respondent to APD, but quickly dismissed that question. He told Complainant that he suspected Flo Sirean had reported him. Respondent learned that an employee had reported skin ulcers and blood in the urine. He asked Complainant if she had reported such things and she said she had not. Respondent suspected Skinner had reported those

problems, because she was the only other employee.

19) Respondent told Complainant and Skinner not to talk with Gerry unless Respondent or Ms. Markwell was in the office. Gerry told Respondent that Gerry needed to interview the employees again and complete the inspection. Respondent told Complainant to talk with Gerry before or after office hours or on her lunch break, in order not to disrupt the office practice.

20) On January 28, 1988, Respondent was late for an appointment with Gerry, who then interviewed Complainant and Skinner before Respondent arrived. Respondent asked Skinner what she told Gerry, and she replied that the interview was confidential. Complainant did not tell Respondent or Ms. Markwell what she told Gerry in that interview.

21) On Friday, January 29, 1988, Gerry met with Respondent for a final interview. Gerry advised Respondent that no employee was to mix, reconstitute, handle, or otherwise be exposed to the cancer chemotherapy drugs until certain protective equipment was put into use. Respondent was to be solely responsible for all handling, mixing, and reconstituting of the drugs until that time. Gerry sent Respondent a letter dated January 29, 1988, confirming their understanding.

22) On February 1, 1988, Respondent gave Complainant a copy of Gerry's January 29 letter and a memo instructing her that only he would mix the drugs. He told her to stay out of the lab. Up to that time Complainant had performed about 70 percent of the lab work. Due to the change in her job responsibilities, she was expected to reduce her hours of work. At times Respondent brought Complainant into the lab to advise him on mixing the drugs. Respondent and Complainant were frustrated because the requirement that he mix all drugs slowed down the practice. At some point Complainant resumed mixing the drugs.

23) On February 3, 1988, Gerry delivered a citation to Respondent citing him with numerous violations of the Oregon Safe Employment Act and rules, and issued proposed penalties of $8150. Respondent appealed the violations and settled on a lower penalty of around $4000.

24) Among the violations that Respondent was cited for were: failure to provide training about the drugs, such as detection methods, hazards, and emergency procedures; failure to provide safety equipment, such as gloves, gowns, and goggles; storing food and beverages in the refrigerator where the drugs were stored; improper disposal of infectious waste, such as needles; and failure to investigate worker injuries, such as needle sticks, and take corrective measures.

25) During and after the APD investigation, stress in the office increased "tremendously." The working relationship between Respondent and Complainant was strained. Complainant perceived that Respondent was angry at her. Respondent often was upset, swore, and lost his temper around Complainant. Skinner and Diann Powrie, a nurse consultant, noticed the stressful relationship between Respondent and Complainant. Skinner quit in mid-March 1988 due in part to the stress. She felt Complainant contributed to the stress because of her "crisis life style."

26) During the entire period of Complainant's employment, Respondent never gave Complainant a performance evaluation. Once in a while Respondent would thank Complainant for her work. Ms. Markwell gave Complainant a couple of verbal performance appraisals. There were complaints that Complainant was working too many hours, which cost too much money. During 1987 Respondent had become "disturbed" at Complainant about the incidents of "dry labbing" and the canceled lecture. During March 1988 Respondent reprimanded Complainant for using the office telephone for personal calls.

27) Diann Powrie was a director of consultants and marketing for Pharmacy Corporation of America. She was contacted by Complainant to come to Respondent's office to describe her services, which included training medical staff on the use of medical products that her company could supply to patients. Respondent started using Powrie's services in December 1987, and she came to Respondent's office two to three times per month.

28) On Monday, March 21, 1988, Respondent and Ms. Markwell met with Powrie over lunch to discuss problems, which had continued since 1987, of stress and lack of communication in the office. Powrie had observed Complainant at work and felt that she suffered from stress, overwork, and fatigue. Powrie advised Respondent that he needed an additional nurse, and that Complainant needed time off, suggesting two weeks.

29) In the evening, around 7 p.m., on March 21, 1988, Complainant was waiting to be picked up at the office by her husband, Jim King. She was standing in the waiting room, and had turned off the lights, except one which stayed on all night by the front office. Ms. Markwell came in the front door and met Complainant. She said that Respondent and Complainant were both burned out. She asked Complainant if she wanted to work there, or would rather do something else. Ms. Markwell offered to help Complainant in any way, such as a letter of recommendation. She said she would give Complainant a pension of an IRA based upon 25 percent of her earnings during the year. She also noted that Complainant had never taken a vacation. Ms. Markwell suggested that she, Complainant, and Respondent meet the next day to discuss the situation. During that conversation, Complainant's husband arrived and sat reading a magazine in the waiting room. When the conversation was over, Complainant and Ms. Markwell hugged and Mr. King took Complainant home.

30) On March 22, 1988, Complainant, Respondent, and Ms. Markwell met in Respondent's private office. Respondent said that he needed to find some way to reduce the stress in the office and "get beyond this APD thing," which caused stress. Respondent told Complainant that he and Complainant needed to start their lives over. He asked Complainant whether she had considered taking another job. Complainant said "no," that she loved her job and the patients. Complainant said she knew of a part-time job available at Sacred Heart Hospital.

Respondent offered to write her a letter of recommendation. He said he would schedule patients around her interviews. Ms. Markwell stated that Complainant had not taken a vacation in three years. Respondent offered Complainant a week of paid vacation and another week of unpaid leave. The vacation was to begin on Monday, April 4, 1988. Respondent and Ms. Markwell expected Complainant to return at the end of the vacation leave and they would evaluate her employment status. Complainant felt that she was being terminated, but did not know what Respondent's reason was.

31) Nita Barkelew worked for Respondent as an insurance billing clerk during late March and April 1988, and worked with Complainant. Her first work day was March 21, 1988. A couple of days after she started, Ms. Markwell told Barkelew that Complainant was quitting because she was burned out from the stress of the job. Complainant told Barkelew about the APD investigation and the citation that Respondent had been issued. Barkelew got a copy of the citation from APD, and after reading it she decided that the workplace was unsafe and quit without notice. She never discussed the reason why she quit with Respondent.

32) Sometime within the week after March 22, Ms. Markwell contacted the Oregon Employment Division office about referring a nurse to hire. Respondent hired a new nurse the following week, to start work on April 4. It took much longer to hire a nurse than Ms. Markwell had anticipated.

33) On March 25, 1988, Powrie, Complainant, and Ms. Markwell had a conversation in which Ms. Markwell said that she, Respondent, and Complainant had met and agreed that Complainant would take one week off with vacation pay. Powrie said that one week was not enough, that Complainant needed to take two weeks off. From the conversation, Powrie had the impression that Complainant would return to work after the vacation. Powrie offered to take Complainant out to lunch on April 1, which she thought was Complainant's last day before vacation.

34) On March 30, 1988, Complainant told Powrie that she had been fired and April 1 was her last day.

35) Complainant's last day of work for Respondent was Friday, April 1, 1988. Respondent gave Complainant a letter of recommendation "because she was the sole support of her family. I felt very sorry for her situation. I wanted her to have another job -- take my nurse, please." Powrie came into the office to take Complainant out to lunch. Powrie asked Respondent to join them. Complainant told Powrie on the way to lunch that she was going to take a vacation, and had a job interview at Sacred Heart Hospital. During lunch Respondent told Complainant that he was buying a piece of equipment for the lab, and they talked about office matters. Respondent asked Complainant to come back in for a week beginning on April 4 to train the new nurse. Complainant did not give him an answer. Respondent thought she would train the new nurse and then begin vacation the following week. The mood of the lunch was amicable. After lunch Respondent took Complainant back to the office.

Complainant prepared patient charts for the following Monday, cleaned up the office, and collected her personal things before going home.

36) Complainant did not go into work at Respondent's office on April 4, 1988. She had called her attorney, who advised her not to go in. Powrie called Respondent regarding a patient, and Respondent told her that Complainant had not come to work and asked Powrie to come in and help the new nurse with an office full of patients. Powrie went in for two to three hours.

37) Through her attorney, Complainant demanded and was paid her final wages. Respondent paid her a pension benefit for one year.

38) Complainant applied for unemployment insurance benefits on April 22, 1988. On her application she stated that she had been discharged. Respondent did not respond to a notice of her claim from the Employment Division. Complainant received unemployment compensation from May 10 to November 1, 1988.

39) Complainant's credibility was questionable. For the most part the Hearings Referee was impressed by her demeanor that her testimony was believable. However, on several important points her testimony was inconsistent or her memory failed. For example, on the issue of a vacation offer, she testified that she was never offered or promised a vacation. Yet she admitted telling the CRD investigator that, as part of her remedy, she wanted the one week paid vacation that was promised to her. After she left Respondent's employment she forged his signature on his prescription slips. She was caught and convicted of Tampering with Drug Records. She admitted that she forged his signature. Forgery by definition is for the purpose of fraud or deceit. The arrest report indicates that she lied to the police officers, and she told them that she knew what she had done was wrong. At hearing she made the inconsistent statement that she did not know what she had done was wrong when she did it. On many points her testimony was contradicted by credible evidence. For example, she testified and submitted evidence in the form of reports she submitted to the Employment Division that she had given her resume to or contacted a medical society placement service and numerous potential employers. Credible evidence from the placement service and two of the doctors offices revealed no contact with Complainant during the time period she alleged. As a result, her testimony was given less weight whenever it conflicted with other credible evidence on the record. In some cases, her testimony was not believed even when it was not controverted by other evidence.

40) Respondent's credibility was questionable. His stated motives and beliefs were inconsistent and baffling. He testified that he did not discharge Complainant and that he would have welcomed her back. He said she was competent and he had no qualms about recommending her to another oncology doctor. Conversely he testified that he did not trust her and could not communicate with her, and that he had numerous reasons to fire her. He also testified that he should have fired her earlier and that he wrote her a letter of recommendation so that she

could get another job, stating "take my nurse, please." There were inconsistencies in his testimony. For example, with regard to Complainant forging prescription slips, he testified that he never signed blank prescription slips while Complainant worked for him. Yet he told a police officer who was investigating the forgeries that he had done just that. His testimony about April 1 was incongruous. Ms. Markwell testified that, from the March 22 meeting, she thought that Complainant's vacation would begin on Monday, April 4, which would make her last day in the office April 1. Complainant believed her last day in the office was April 1. Respondent asserted that the letter of recommendation dated April 1 was simply coincidence with Complainant's last day. He testified that he did not think it was Complainant's last day, that there was no significance to it, that only at lunch did he learn that Complainant was leaving. As a result of such inconsistencies, Respondent's testimony was given less weight whenever it conflicted with other credible evidence on the record.

41) Kristine Markwell's testimony was credible. Her demeanor was forthright. Due to her relationship to Respondent, her potential for bias was obvious. However, that alone was not enough to cause the Hearings Referee to conclude that her testimony was not credible. The Hearings Referee was not sufficiently impressed by other evidence or her demeanor so as to find her testimony not credible.

42) Diann Powrie's testimony was credible. She was not related to Respondent and had no apparent personal stake in this matter. She was straightforward with her answers. She offered specifics when she could, and made no attempt at fabrication when her memory failed.

43) The testimony of the other witness was credible. The Hearings Referee observed the demeanor of each witness and found each to be believable.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a person who had one or more employees in the State of Oregon.

2) Complainant was employed by Respondent.

3) The Accident Prevention Division investigated Respondent's medical office. Complainant cooperated with the investigation by giving the inspector interviews and showing him how she performed her job.

4) Complainant exercised rights afforded by the Oregon Safe Employment Act.

5) On April 4, 1988, Complainant quit her employment with Respondent.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and ORS 659.400 to 659.435.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) ORS 654.003 states that:

> "[t]he purpose of the Oregon Safe Employment Act is to assure as far as possible safe and healthful working conditions for every working man and woman in Oregon * * *. To encourage this purpose the Legislative Assembly intends to provide a procedure which will:
>
> "(1) Encourage employers and employees to reduce the number of occupational safety and health hazards and to institute new programs and improve existing programs for providing safe and healthful working conditions.
>
> "* * *
>
> "(4) Provide an effective program * * * to enforce all laws, regulations, rules and standards adopted for the protection of the life, safety and health of employees."

OAR 437-01-025 provides:

> "The Act, other rules adopted thereunder, and these rules shall be liberally construed to accomplish the preventative purposes expressed in the Act."

OAR 839-06-040 provides:

> "In addition to protecting employees or prospective employees who oppose practices, file complaints, institute proceedings, or testify in proceedings, ORS 654.062(5) also protects employees or prospective employees from discrimination because they have exercised "any right afforded by" the Act. Certain rights are directly provided by the act. * * * Certain other rights exist by necessary implication. For example: employees may request information from the Accident Prevention Division and not be discriminated against because of their request; employees interviewed by agents of APD in the course of inspections or investigations cannot subsequently be discriminated against because of their cooperation."

Cooperation and participation by an employee in an investigation conducted by agents of the Accident Prevention Division are exercises of employee rights afforded by ORS 654.001 to 654.295 and 654.750 to 654.780.

4) ORS 654.062(5) provides:

> "(a) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee * * * because of the exercise of such employee * * * of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780."

Respondent did not violate ORS 654.062.

5) Pursuant to ORS 654.062 and ORS 659.060, the Commissioner of the Bureau of Labor and Industries has the authority to issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

The first question that has to be answered in this case is whether Respondent discharged Complainant. The answer is no. Deciding upon the answer was difficult because of credibility problems with both Complainant and Respondent, and the vague conditions attached to the vacation.

During March 1988, Respondent wanted to get some problems behind

him and to start fresh. Complainant was one of Respondent's problems because of their deteriorated working relationship. Respondent testified that he could not fire anybody. However, even if he could not say the words "you're fired," he could and did make it clear that he wanted Complainant to find other employment. He provided her with a letter of recommendation and a week of paid vacation, with additional time off without pay, during which time he wanted her to find another job. April 1 was to be her last day of work. Without any other facts, the Forum would have found that their employment relationship ended on April 1, and the vacation pay was in fact severance pay. However, other facts led the Forum to find that the employment relationship did not end on April 1, 1988.

Ms. Markwell testified that she and Respondent expected Complainant to return at the end of the vacation period and review Complainant's status at that time. That testimony is corroborated by the impressions of Diann Powrie during her conversation with Ms. Markwell and Complainant on March 25, and her impressions from the conversation between Respondent and Complainant at lunch on April 1. It also is consistent with advice Powrie gave Respondent and Ms. Markwell on March 21, which was to give Complainant a vacation and to hire an additional nurse. Respondent asked Complainant to come in on April 4 to help train a new nurse for a week, and then start vacation. She did not accept his request to come in on April 4 because she did not believe she and Respondent had a continuing employment relationship. The fact that Respondent hired a new nurse can easily be viewed as the hiring of Complainant's replacement. It can also be viewed as the hiring of a replacement for Skiff, the extra nurse that Respondent lost in December. The latter view is consistent with Powrie's advice to Respondent to hire an additional nurse. In light of all of his other testimony regarding her performance and their working relationship, I do not find that Respondent would have welcomed Complainant back after her vacation, as he testified. It is reasonable to infer that he hoped she would find a different job. However, after reviewing all of the evidence in the whole record, the Forum finds that Respondent expected her to return after the vacation if she had not found another job. Complainant's and Respondent's employment relationship had not ended on April 1. Therefore, Complainant quit her job when she failed to return to work on April 4, 1988. Even if the meaning of her failure to return was ambiguous – for example, if Respondent assumed that Complainant had gone on vacation – that uncertainty was eliminated when Complainant's attorney contacted Respondent for Complainant's final paycheck. Complainant intentionally took actions that terminated the employment agreement.

The Agency took exception to part of Finding of Fact number 30, namely, that Respondent and Ms. Markwell expected Complainant to return at the end of the vacation leave, and that they then would evaluate her employment status. The Agency based its exception upon testimony from Complainant and Respondent that was

different from the finding of fact. The finding was based on Ms. Markwell's credible testimony, which corroborated Respondent's testimony. Both testified that vacation was discussed at the March 22 meeting and that they expected Complainant to return following a vacation. Since Complainant's testimony was not credible, it does not overcome the other testimony. Respondent's testimony that a vacation date was not discussed at the meeting does not detract from the finding of fact.

The Agency also took exception to Findings of Fact that were based in part on Diann Powrie's testimony because she had testified to her "impressions" and "feelings" about certain conversations rather than to what was actually said in those conversations. Ms. Powrie's testimony was carefully reviewed and supports the Findings of Facts made in this Final Order. Ms. Powrie testified to specific items of conversation, and to her impressions of what came out of conversations when she could not remember actual things that were said. Her testimony was credible, based on the evidence in the record. Her testimony rested on her memory of what was said and her impressions based on those conversations. It was given appropriate weight. No witness can be expected, after more than a year, to remember verbatim conversations that, at the time, were not particularly notable. Witnesses routinely give summaries or their impressions of conversations, and a finder of fact may give such testimony appropriate weight. In this case, Ms. Powrie's testimony either corroborated other credible evidence – such as Ms. Markwell's testimony – or was corroborated by Complainant's and or Respondent's testimony.

The Agency next excepted to Finding of Fact number 28, stating that the

> "fact that Ms. Powrie may have advised Respondent to follow a particular course of action does not alone support that Respondent did not discharge Complainant. In fact, there is no other evidence whatsoever to suggest that Respondent did follow through with Ms. Powrie's advice."

To the contrary, a preponderance of credible evidence supports the finding that Respondent followed through with Ms. Powrie's advice. *See* Findings of Fact numbers 29, 30, 32, 33, and 35.

Finally, the Agency took exception to the lack of a Finding of Fact regarding the award of unemployment benefits to Complainant. Such a finding has been added to this Final Order. *See* Finding of Fact number 38. As the facts show, Complainant indicated on her application for unemployment compensation that she had been discharged by Respondent, and he did not respond to a notice of her claim from the Employment Division. The Employment Division awarded benefits on that basis. That award is not "compelling evidence," as the Agency suggests, of a discharge. The Employment Division granted benefits because Respondent did not respond to a notice. Its decision was not based upon any investigation of the reasons behind the termination of employment. One may speculate as to the reasons why Respondent did not respond to the notice; however, in light of the facts found in this case, the Forum declines

to infer that Respondent did not respond because he had discharged Complainant.

In its exceptions, the Agency concluded that the Findings of Facts relied upon by the Hearings Referee were not supported by substantial evidence, citing ORS 183.482(8)(c). The Civil Rights Division applies a substantial evidence test in investigations. *See* ORS 659.050(1), OAR 839-03-065(8), and 839-05-005. While substantial evidence is the correct degree of proof for judicial review and for investigations, a preponderance of the evidence is, with few exceptions, the correct degree of proof for findings of facts in administrative hearings. *See School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135, 1145 (1975); *Metcalf v. AFSD*, 65 Or 761, 672 P2d 379 (1984). *But see In the Matter of Oregon State Correctional Institution*, 7 BOLI 161, 195 (1988), *appeal filed*. This is consistent with the burden of persuasion in civil cases. *See* ORS 10.095(5). Similarly, a preponderance of the evidence is the burden of persuasion in federal civil rights cases. *See Texas Department of Community Affairs v. Burdine*, 450 US 248, 25 FEP 113 (1981). The Forum applied the preponderance of the evidence standard in this case when making findings of facts.

The facts in this case do not merit a constructive discharge analysis. There simply are no facts showing the kind of intolerable working conditions that would compel Complainant to resign. *See In the Matter of Lee's Cafe*, 8 BOLI 1, 19-20 (1989). To the contrary, Complainant testified that she loved her job, and although she believed she had been discharged on March 22, effective April 1, she did not know the reason for it.

As a result of the determination that no discharge occurred, the Forum need not consider questions of causation or remedy.

ORDER

NOW, THEREFORE, the Respondent having not engaged in the unlawful practice charged, the specific charges and the complaint against the Respondent in this matter are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
Daniel Vincent, dba
DAN'S UKIAH SERVICE,
and James Douglas Vincent,
Respondents.

Case Number 39-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 18, 1989.

SYNOPSIS

Respondent Dan Vincent failed to pay Claimant minimum wage and overtime. It was no defense that Respondent and Claimant had an agreement that Claimant would work for less than minimum wage. Respondent was required to maintain payroll records, and failed to keep time or payroll records. The Commissioner relied on Claimant's records to show the amount and extent of his work. Work time included time the Claimant was engaged to wait for work, and time he spent in training by Respondent. The Commissioner permitted a setoff from wages due for Claimant's rent and grocery bills paid by Respondent, and for damage Claimant cause to Respondent's truck. Respondent willfully failed to pay Claimant all wages due within 48 hours after claimant quit and was liable for civil penalty wages. ORS 652.140, 652.150, 652.610(4), 653.010(1), 653.025, 652.045, 653.055; OAR 839-20-030.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 14 and 15, 1989, in the State Office Building, 700 SE Emigrant 1240, Pendleton, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Lee Bercot, an employee of the Agency. David B. Armagost (hereinafter Claimant) was present throughout the hearing. Daniel Vincent (hereinafter Dan Vincent or Employer) and James Douglas Vincent (hereinafter Doug Vincent or Employer) represented themselves. Dan Vincent was present at the hearing on June 14, 1989. Doug Vincent was present at the hearing on June 14, 1989, and until approximately 11 a.m. on June 15, 1989.

The Agency called the following witnesses (in alphabetical order): David B. Armagost, Claimant; Lee Bercot, Case Presenter with the Agency; Ted Corley; Larry Ellis; Richard Gomez, Compliance Specialist with the Wage and Hour Division of the Agency; Lynn Hampton, Deputy District Attorney, Umatilla County; Nancy Klahn, Deputy District Attorney, Umatilla County; James Leonard Lawhead; James Terry Lawhead; Mary Mattson, Administrative Assistant with the Agency; Sara Sams, Clerical Specialist with the Agency; Lt. Dave Schuening, Umatilla County Sheriff's Department; Mike Spencer; Phillip Stubblefield; and Harold Wright.

Employers called the following witnesses (in alphabetical order): Jay Hinkle; Barbara Palmer; Mike Palmer; Thelma Stubblefield; Employers Daniel and James Douglas Vincent; and Patsy Vincent.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On August 25, 1987, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Dan's Ukiah Service, and had not been paid all wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for

Claimant, all wages due from his previous employer.

3) During the investigation, the Agency sent Doug Vincent and Dan's Ukiah Service three demand letters and requests for records. Doug and Dan Vincent received the letters and gave them to Patsy Vincent, the bookkeeper. She did not respond to the letters.

4) On March 10, 1988, the Commissioner of the Bureau of Labor and Industries served Dan Vincent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Dan Vincent owed a total of $2852.81 in wages and $1655 in civil penalty wages. The Order of Determination required that, within 20 days, Employer either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

5) Following an extension of time, Dan Vincent filed a timely request for an administrative hearing and an answer to the charges. In the answer he denied that any wages were due to Claimant.

6) On April 24, 1989, the Agency sent the Hearings Unit a request for a hearing date. On April 28, 1989, the Hearings Unit issued a Notice of Hearing to Dan Vincent, the Agency, and the Claimant indicating the time and place of the hearing.

7) With the Notice of Hearing the Hearings Unit served Dan Vincent the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and b) a complete copy of the Agency's administrative rules regarding the contested case process.

8) On May 8, 1989, the Forum sent Dan Vincent, the Agency, and Claimant a Notice of Change of Hearings Referee.

9) On May 9, 1989, the Agency sent Dan Vincent a subpoena duces tecum that commanded him to mail copies of various documents, such as time and payroll records, to the Agency by May 24, 1989. He received the subpoena and thought it was "crap." He gave it to his mother, Patsy Vincent, who said it was nonsense but she would take care of it. She did not respond to the Agency or comply with the subpoena. She made no search for any of the requested records until a couple of days before the hearing. At that time, Lee Bercot called her and she said she had no time records for Claimant. Doug Vincent offered at hearing a small book purporting to be a record of Claimant's hours kept by Patsy Vincent. The Agency objected, and pursuant to OAR 839-30-110(4) the Hearings Referee did not receive the book into evidence.

10) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case, including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Employers did not submit a Summary of the Case.

11) During a pre-hearing conference, Doug Vincent requested that he be allowed to join this action as a party. He waived any rights he had regarding service and notice. He understood and accepted that he might be found liable for unpaid wages and civil penalty wages. The Agency had no objection. After the hearing began, Doug Vincent affirmed his request and waiver on the record. The Hearings Referee granted the request pursuant to OAR 839-30-085, and the caption of the Order of Determination was amended to that which appears on the first page of this Order.

12) During a pre-hearing conference, Employers and the Agency stipulated to certain facts, which were read into the record by the Hearings Referee at the beginning of the hearing.

13) At the start of the hearing, Employers said they had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

14) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

15) Dan Vincent voluntarily did not appear on June 15, 1989, the second day of hearing. Throughout the hearing, Doug Vincent claimed that the process was unfair: because he could not subpoena witnesses (despite the fact that he said he had read the Notice of Contested Case Rights and Procedures, which advised him how to obtain subpoenas through the Hearings Unit); because he could not afford an attorney; and because of his beliefs, which were shared by Dan and Patsy Vincent, that government and the justice system were unjust, and that government regulations were driving small businesses out of business. At around 11 a.m. on June 15, when the Hearings Referee did not admit an exhibit he offered (*see* Finding of Fact – Procedural number 9), Doug Vincent said he did not wish to present any additional evidence, and wanted to leave the hearing. The Hearings Referee informed him that the hearing would continue even if he decided to leave. He made a closing statement and left the hearing before the Agency presented its rebuttal witnesses and closing statement.

16) On July 14, 1989, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing, including the Employers. Participants had 10 days to file exceptions to the Proposed Order. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Dan Vincent, age 26, did business as Dan's Ukiah Service, a gasoline service station located in Ukiah, Oregon. He employed one or more persons in the State of Oregon. Dan Vincent's father, Doug Vincent, was an agent or employee of Dan Vincent at the service station. Doug Vincent helped manage the station, and in many respects directed Dan Vincent. Doug Vincent operated his logging truck out of the station, and Dan Vincent was involved in the operation and maintenance of the truck. Dan Vincent's mother, Patsy Vincent, was the bookkeeper for the business, that is, the operation of the station and the logging truck. Dan Vincent lived with his parents.

2) Employers' business grossed under $250,000 in its last four calendar quarters, including through August 1987.

3) On May 11, 1987, Claimant drove his car into a 1976 Chevrolet Luv pickup truck owned by Dan Vincent. Claimant was cited for the accident. He did not have automobile insurance. In exchange for Claimant's agreement to make restitution for the damage to the truck, Dan Vincent requested that the Umatilla District Attorney terminate prosecution of Claimant on the traffic citations. On June 11, 1987, the citations were dismissed by a district court judge.

4) Dan Vincent never had a professional estimate made on the cost to repair the truck, although he promised Claimant he would do so. Dan Vincent never told Claimant what the cost of the damage was. After examining the damage, Dan Vincent told Lt. Schuening that repairs would cost about $600. Dan Vincent replaced the following, with either new or used parts: a wheel and tire (cost: $45 to $55); ball joints (new, cost unknown); steering knuckles (cost unknown); spindle (used, cost unknown); a steering arm (new, cost unknown); and an A-frame (used, cost unknown). He also worked on the truck's frame, pulled the fender out, and had the front end aligned (cost: $25 to $30). He thought a new fender would cost about $215. To repair all of the damage, including labor and after market parts, would cost approximately $400. Dan Vincent sold the truck for his asking price of $500. When sold, the truck drove as though it had not been damaged.

5) Between May 11 and 26, 1987, Dan Vincent and Claimant entered into an oral agreement that Claimant would perform work for $150 per week. There was no agreement about overtime hours. No set number of hours per day or days per week was agreed upon. Claimant and Dan Vincent agreed that Claimant would receive $75 per week and that Dan Vincent would retain $75 per week toward restitution for the damage to his truck. The wage agreement was the same regardless of whether Claimant worked at the station or on the logging truck. No record was kept of Claimant's hours of work by Doug or Dan Vincent. No taxes or other statutory withholdings were taken from Claimant's pay.

6) Claimant was employed by Employers Doug Vincent and Dan Vincent from May 26, 1987, through August 7, 1987.

7) Claimant worked as a service station attendant for Dan Vincent, occasionally assisting Doug Vincent with his logging truck.

8) Claimant's duties at the station included: pumping gas; fixing tires; steam cleaning equipment; helping Dan Vincent, Doug Vincent, or Glen Althauser (a mechanic at the station) with repairs; acting as cashier; and cleaning up. Claimant's duties on the logging truck included strapping and unstrapping the logs, helping the driver, and being trained by Doug Vincent to drive the truck.

9) For about the first 10 days that Claimant worked at the station, Dan Vincent was happy with Claimant's work. Sometime after the traffic citations were dismissed, Dan Vincent noticed a change in Claimant's work, and he became dissatisfied with Claimant. Dan Vincent was an abrasive person, and he and Claimant did not get along well. Around mid-June, Dan Vincent fired Claimant. Doug Vincent rehired Claimant the next day under the same wage agreement as described in Finding of Fact number 5.

10) After Claimant was rehired, Employers told Claimant to work on the logging truck with Doug Vincent, who had recently been injured. After Doug Vincent and Claimant returned in the truck each day, Doug Vincent told Claimant to finish the day working in the station. After Doug Vincent's health improved, Claimant again worked only at the station, where he was supervised by both Doug and Dan Vincent. Dan Vincent brought Claimant into the station to be available for work. Sometimes he kept Claimant at the station just so Doug Vincent would not have to find him when there was work. When it was slow, he kept Claimant busy sweeping or with other such work. Dan Vincent did not believe that he had to pay an employee who was engaged to wait for work.

11) Claimant never drank alcohol or was drunk while he was working. Jay Hinkle thought Claimant acted "goofy all the time," like he was drunk. Claimant drank after work at home or in a tavern.

12) Both during and after the time when Claimant worked for Dan and Doug Vincent, Mark Stubblefield was employed at the station.

13) Each day he worked, Claimant wrote down his hours on a calendar that he kept at James L. Lawhead's house.

14) Claimant quit without advance notice on August 7, 1987.

15) Claimant's records and credible testimony revealed that he usually started work at around 9 a.m., and finished work at around 8 to 9 p.m. On some days when he helped Doug Vincent on the logging truck, Claimant started work at 3 a.m. Occasionally Dan Vincent would go to the trailer where Claimant lived and wake him up for work. Claimant normally worked 11 or 12 hours per day, seven days per week. He occasionally had Wednesdays off. He requested additional time off, but Dan Vincent refused it. Claimant had no set meal or break periods when he was completely relieved of duties. During the period of his employment, he worked 68 days and a total of 813.5 hours. Of those hours, 440 were straight time hours, that is, hours up to and including 40 per week. The remaining 373.5 hours were overtime hours, that is, hours in excess of 40 per week.

16) Pursuant to ORS chapter 653 (Minimum Wages), OAR 839-20-030 (Payment of Overtime Wages), and Agency policy, the Agency calculated Claimant's total earnings to be $3352.71. The total reflects the sum of the following:

440 hrs. @ $3.35/hr. (the minimum wage, (MW))	$1,474.00
373.5 hrs. @ $5.03/hr. (the overtime rate: 1.5 times MW)	$1,878.71
Total Earned	$3,352.71

17) Claimant worked for 11 weeks at the rate of $150 per week. He received $75 cash each week, for a total of $825. Dan Vincent retained $75 each week toward restitution for the damage to the Chevrolet pickup truck, for a total of $825. In addition, Doug Vincent paid a rent and grocery bill of

$400 for Claimant. Doug Vincent occasionally bought a meal for Claimant. Claimant was not expected to pay Doug Vincent for the meals. The meals never affected Claimant's pay. Employers had no written authorization from Claimant to make deductions from his pay.

18) Civil penalty wages were computed in accordance with Agency policy on the Wage Transcription and Computation Sheet as follows: $3352.71 (the total wages earned) divided by 68 (the number of days worked during the claim period) equaled $49.30 (the average daily rate of pay). This figure of $49.30 was multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $1479.

19) Dan Vincent did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued. Neither Dan nor Doug Vincent provided any such evidence for the record at the hearing.

20) Claimant's testimony was credible. His demeanor was calm and forthright, even where his memory was deficient and unsupportive of his wage claim. He responded to questions without hesitation and made no effort to avoid any issue. His statements were supported by testimony from other witnesses who the Hearings Referee had no reason to disbelieve.

21) Doug Vincent's testimony was not credible. His demeanor was manipulative and insincere. He made many statements that were inconsistent with credible evidence. For example, he said that a previous wage claim against him had been paid off. However, credible evidence showed that he had paid only $200 and still owed over $6600 on a 1986 judgment based on three employees' wage claims. That judgment was determined to be uncollectible by the Oregon Department of Revenue. As another example, he stated at hearing that the station was Dan Vincent's business, and it was separate from his logging truck business. However during a prehearing telephone conversation about the subpoena, he told Lee Bercot that he owned the station. He expressed malice for the Claimant and threatened him during the hearing. He had a conviction in 1987 for arson, which involved evidence of an intent to defraud an insurance company. For the above reasons his testimony was not credible and was given little weight whenever it conflicted with credible evidence on the record. In some cases, his testimony was not believed even when it was not controverted by other evidence.

21) Dan Vincent's testimony was not credible. His demeanor was volatile and his testimony was easily manipulated by his father, Doug Vincent. He admitted that during his testimony he said things he did not mean because he could not cope with the pressure and frustration. His testimony was often vague and inconsistent. For example, he testified that he did not need or want Claimant around the station, and yet he testified that he regularly roused Claimant out of bed for work – some 30 to 40 times. He testified that, after he had fired Claimant in mid-June, he did not think Claimant was his employee, but instead Doug Vincent's employee. However, he testified that he paid Claimant for his work at the station, where Claimant worked during and after the time he worked on the log truck with Doug Vincent. In addition, Dan Vincent's testimony regarding the cost of the damage to the pickup truck fluctuated. He told the police that, after examining the truck, the damage repair would cost $600. He twice testified that the cost was $1,200 – the difference between it's alleged value before the accident ($1,700) and the price he asked for it when he sold it ($500). He once testified that the parts cost $600 to $700, and labor was $300 to $400. Another time he testified that the total cost of the damage would be $400 – the cost of parts alone, since he would not charge Claimant for the labor. He expressed malice for the Claimant. For the above reasons, his testimony was untrustworthy and was given little weight whenever it conflicted with credible evidence on the record. In some cases, his testimony was not believed even when it was not controverted by other evidence.

22) Mike Palmer's testimony was given little weight because his memory was weak and much of his testimony was directly controverted by credible evidence. In addition, his opportunity to observe Claimant's work was very limited because he infrequently stopped at the gas station.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Dan Vincent was a person doing business as Dan's Ukiah Service in the State of Oregon, and employed one or more persons in the operation of that business.

2) Dan Vincent employed Claimant from May 26 to August 7, 1987.

3) During the wage claim period, Dan Vincent and Claimant had an oral agreement whereby Claimant's rate of pay was $150 per week. There was no agreement about how many hours per day or days per week Claimant was required to work.

4) Claimant's last day of work was August 6, 1987. He notified Dan Vincent that he was quitting employment on August 7, 1987.

5) During the period May 26 to August 7, 1987, Claimant worked 68 days and earned $3,352.71.

6) Dan Vincent owes Claimant $1,727.71, which represents $3,352.71 earned, minus $825 in wages paid, minus $400 for damage to the pickup truck, and minus $400 Doug Vincent paid for Claimant's bills.

7) Dan Vincent willfully failed to pay Claimant all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays, and holidays, after his quitting on August 7, 1987. More than 30 days have elapsed from the due date of those wages.

8) Claimant's average daily rate for the wage claim period of employment was $49.30 ($3,352.71 earned divided by 68 days equals $49.30 average rate per day).

9) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal $1,479 (Claimant's average daily rate, $49.30, continuing for 30 days).

10) Dan Vincent made no showing that he was financially unable to pay Claimant's wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Dan Vincent was an employer and Claimant was an employee, subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405, and ORS 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Employers herein.

3) Prior to the commencement of the contested case hearing, the Hearings Referee informed the Employers of their rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) The actions or inactions of Doug Vincent, an agent or employee of Dan Vincent, are properly imputed to Dan Vincent.

5) ORS 653.025 requires that:

> " * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:
>
> "* * *
>
> "(2) For calendar years after December 31, 1985, $3.35."

Dan Vincent failed to pay Claimant the minimum wage rate of $3.35 for each hour of work time.

6) OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Dan Vincent was obligated by law to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage of $3.35, for all hours worked in excess of 40 hours in a week. Dan Vincent failed to so pay Claimant.

7) ORS 652.140(2) provides:

> "When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of such quitting shall become due and payable immediately if such employee has given not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of an intention to quit employment. If such notice is not given, such wages shall be due and payable 48 hours, excluding Saturdays, Sundays and holidays, after such employee has so quit employment."

Dan Vincent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays, and holidays, after Claimant quit employment on August 7, 1987.

8) ORS 652.150 provides:

> "If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment, as provided in ORS 652.140, then, as a penalty for such non-payment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Dan Vincent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages to Claimant when due as provided in ORS 652.140.

9) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Dan Vincent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

Employers did not assert and the Hearings Referee did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Employers or Claimant.

1. Who was the Employer

An initial issue that had to be resolved in this matter was whether Claimant was employed by Doug Vincent and Dan Vincent separately. Employers asserted that Doug Vincent employed Claimant on the log truck, and that such employment was distinct from Claimant's employment by Dan Vincent at the service station. That assertion failed for a number of reasons.

First, neither Employer was credible. Thus, their assertions alone were insufficient evidence upon which to make findings of fact.

Second, credible evidence showed that Employers, with Patsy Vincent, operated the station as a family unit. The station and the log truck business were intertwined. Doug Vincent worked at the station, and in many ways ran it. He gave orders to Dan Vincent, who helped maintain the operation of the truck. Patsy Vincent handled the business or bookkeeping details for both the station and the log truck.

Third, when Doug Vincent rehired Claimant after Dan Vincent had fired him, Claimant continued to work for both Doug and Dan Vincent at the station and for Doug Vincent on the truck. Claimant's pay and duties were the same, except that for a short time he worked on the log truck. Doug Vincent asserted that he, rather than Dan Vincent, paid Claimant $75 per week for his work on the truck. No credible evidence showed that Doug Vincent paid an additional $75 to Dan Vincent for restitution on the pickup. The evidence permits the inference that Employers' finances were intermingled. No credible evidence established that Employers were operating two separate businesses. To the contrary, credible evidence showed that Doug Vincent was Dan Vincent's agent, if not his partner, in the gas station business. Accordingly, Claimant was not employed by two separate employers, although he had two bosses. He was employed by Dan Vincent, and was rehired by Dan's agent, Doug Vincent, to continue working for the same pay and with wider duties.

2. Hours Worked

Dan Vincent kept no time or payroll records for Claimant. He said he did not know that he was required to keep records and left such matters to his

mother, Patsy Vincent. ORS 653.045 requires an employer to maintain payroll records. Where the Commissioner concludes that a claimant was employed and was improperly compensated, it becomes the burden of the employer to produce all appropriate records to prove the precise amounts involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Sheila Wood*, 5 BOLI 240, 253-54 (1986). Where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of [claimant's] work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." 328 US at 687-88.

Here, the great weight of credible evidence led to the conclusion that Claimant was employed by Dan Vincent and was improperly compensated. Despite Employers' assertions that Claimant came to work late and was told to go home early, credible evidence corroborated Claimant's recorded hours shown in Finding of Fact number 15. Dan Vincent testified that even after he told Claimant to go home, Claimant stayed and Dan Vincent gave him work to do. Dan Vincent said he brought Claimant into the station simply to be there so that Doug Vincent would not have to look for him when Doug Vincent had work for him to do. Dan Vincent admitted that he engaged Claimant to wait for work.

"Employ" includes to suffer or permit to work. ORS 653.010(1). Work time is all time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. There is no requirement on the part of the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty and the time period is sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. In this case Dan Vincent suffered or permitted Claimant to remain on the Employer's premises, where he either waited for work or was given work. The time Claimant spent waiting for work was compensable work time. Similarly, training time is considered a cost of doing business for an employer. Thus, the time Claimant spent training as a log truck driver was compensable work time.

Employers also declared that Claimant did little or no work, with the apparent inference that this was poor performance and that he earned no pay when he did such work. The Commissioner has previously said that such a defense is without merit.

> "If an employer determines that an employee is not performing a job adequately, the employer may take disciplinary action, or when appropriate, terminate the employee. However, the employer cannot seek redress by refusing payment after the fact for hours actually worked by [the] employee." *In the Matter of Marion Nixon*, 5 BOLI 82, 88 (1986).

3. Rate of Pay

ORS 653.025 prohibits employers from paying their workers at a rate less than $3.35 for each hour of work time. ORS 653.055(1) provides that

> "[a]ny employer who pays an employee less than the [minimum wage] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; * * * and (c) For civil penalties provided in ORS 652.150."

ORS 653.055(2) states that

> "[a]ny agreement between an employee and an employer to work at less than the [minimum wage] is no defense to an action under subsection (1) of this section."

Credible evidence based on the whole record establishes that Dan Vincent paid Claimant at a rate less than $3.35 per hour. The wage agreement between Dan Vincent and Claimant is no defense.

OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Dan Vincent is obligated by law to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage of $3.35, for all hours worked in excess of 40 hours in a week. The overtime rate was $5.03 per hour.

Therefore, Claimant's earnings shown in Ultimate Finding of Fact number 5 were based upon hours of work time supported by a preponderance of credible evidence and upon rates of pay required by law.

4. Wages Earned and Wages Due

Claimant earned $3,352.71 in wages. Those earned wages were reduced by three sums to determine wages due and owing. First, Claimant was paid $825 in wages. Second, a setoff was allowed for the $400 Doug Vincent paid for Claimant's rent and grocery bills. And third, a setoff of $400 was allowed for the damage Claimant caused to Dan Vincent's pickup truck. *See* ORS 652.610(4). Thus, the balance of wages due and owing was $1727.71.

Regarding the setoff for the rent and grocery bill, there was no dispute. Regarding the cost of the damage to Dan Vincent's pickup truck, the only reliable evidence was given by Mr. Spencer, who had experience in estimating and making auto repairs. Using after market parts, the repair would have cost approximately $400, including labor. Dan Vincent's testimony about the damage fluctuated so much that it was unreliable. *See* Finding of Fact number 21. Phil Stubblefield, who bought the truck, based his testimony about the cost of repairs in part on what Doug Vincent told him, and in part on his own opinion. Since Doug Vincent was not credible, what he told Mr. Stubblefield was not reliable. Mr. Stubblefield's opinion was given little weight because he never had an estimate made on the cost of repair, he never checked a reliable source about the value of the truck, and he had no experience in the business of repair estimating. There was no reliable evidence about the value of the truck before it was damaged or when it was sold in 1987. The sale price of $500 was chosen by Dan Vincent and accepted by Mr. Stubblefield without negotiation and as part of a deal involving an additional car. The evidence was

not convincing that the sale price was the fair market value of the truck when sold. For that reason, the sale price was no measure of the cost of the damage.

5. Civil Penalty Wages

Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the Commissioner that willful, under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (9/26/86). Willful does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. *State ex rel Nilsen v. Johnston et ux*, 233 Or 103, 377 P2d 331 (1962).

> "A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, above.

Dan Vincent must be deemed to have acted willfully under this test, since there was no credible evidence disputing that his conduct was done of free will. Accordingly, pursuant to ORS 652.150, Dan Vincent is liable for a civil penalty of $1,479. *See* Ultimate Findings of Fact numbers 7 to 10.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders DANIEL VINCENT to deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DAVID ARMAGOST in the amount of THREE THOUSAND TWO HUNDRED SIX DOLLARS AND SEVENTY ONE CENTS ($3,206.71), representing $1,727.71 in gross earned, unpaid, due, and payable wages; and $1,479 in civil penalty wages, plus interest at the rate of nine percent per year on the sum of $1,727.71 from September 1, 1987, until paid, and nine percent interest per year on the sum of $1,479 from October 1, 1987, until paid.

In the Matter of

WESTERN MEDICAL SYSTEMS, INC.,

Respondent.

Case No. 43-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued September 15, 1989.

SYNOPSIS

Respondent discharged Complainant because he had applied for workers' compensation insurance benefits after an on-the-job injury. The Commissioner found Respondent's asserted legitimate nondiscriminatory reasons for the discharge (over staffing and customer complaints) to be pretextual. The Commissioner permitted Respondent to take legal deductions from Complainant's back pay award. Unemployment benefits received by Complainant were not offset against his back pay award. The Commissioner also awarded Complainant damages for mental suffering. ORS 652.610, 659.410.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 1, 1989, in Room 220 of the State Office Building, 165 East 7th Street, Eugene, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Linda Lohr, an employee of the Agency. Nicodemus H. Nepper (hereinafter Complainant) was present throughout the hearing. Western Medical Systems, Inc. (hereinafter Respondent) was represented by James A. Pearson, Attorney at Law. Charles Wilson, president of Western Medical Systems, Inc., was present during most of the hearing as Respondent's representative.

The Agency called the following witnesses (in alphabetical order): Donna Broadsword, Investigator, Civil Rights Division of the Agency; and Nicodemus H. Nepper, Complainant. Respondent called the following witnesses (in alphabetical order): Doyal Eubank, controller for Respondent; Riki Foster, employee of Respondent; Robert Smallwood, service manager for Respondent; and Charles W. Wilson, president for Respondent.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about December 7, 1987, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that he was the victim of an unlawful employment practice of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice, under ORS 659.410, by Respondent.

3) Efforts to resolve the case by conciliation failed.

4) On May 22, 1989, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent had discharged Complainant from employment because Complainant suffered an on-the-job injury and utilized the Oregon workers' compensation procedures. The Specific Charges alleged that Respondent's action violated ORS 659.410.

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. Following a postponement,

the Forum duly served an Amended Notice of Hearing on Respondent and the Agency.

6) On June 9, 1989, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated that Complainant was discharged because he was unqualified and Respondent was over staffed. Respondent also indicated that its correct corporate name was that shown in the caption of this Order. At the beginning of the hearing the Hearings Referee allowed the Specific Charges to be amended to reflect Respondent's correct name.

7) Pursuant to OAR 839-30-071, the Agency and Respondent each filed a Summary of the Case.

8) A pre-hearing conference was held on August 1, 1989, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

9) At the commencement of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

10) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On August 15, 1989, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the certificate of mailing. Pursuant to OAR 839-30-165, the Agency and Respondent had 10 days to file exceptions to the Proposed Order. On August 24, 1989, the Hearings Unit received Respondent's exceptions, which are addressed throughout this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent Western Medical Systems, Inc. was an Oregon corporation.

2) Respondent is, and at all times material was, an employer in this state utilizing the personal services of six or more employees.

3) Complainant was a worker employed by Respondent on March 2, 1987, as a service engineer. He installed and serviced mainly X-ray equipment.

4) When he was hired Complainant signed an employment contract that provided for a salary increase after 90 days from $12,000 to $13,000 annually. The first 90 days of employment were considered a probationary period, after which Complainant should have been evaluated by his supervisor, Robert Smallwood, who was Respondent's service manager. Complainant received the salary increase after 90 days. He normally worked 40 hours per week. His hourly rate of pay, after the raise, was $6.25 ($13,000 divided by 2080 hours, or 40 hours per week for 52 weeks).

5) When hired, Complainant had a two year diploma from an electronics school and job experience in electronics. Complainant was told by Respondent he would be sent to factory classes to learn about some of the equipment he installed and serviced. Because there was not enough money, Complainant was not sent to the factory classes. Smallwood gave Complainant some training, and but never evaluated Complainant's work on an individualized basis.

6) Complainant worked with other employees in the service department, including Dan Soleim and Mike Smith. Soleim and Smith believed that Complainant did a good job and knew of no complaints regarding his work.

7) Soon after Complainant was hired, the radiology manager of The Eugene Clinic, David Carter, made some constructive criticisms of Complainant to Respondent. Carter perceived that Complainant lacked patience.

8) Complainant was sometimes "called back" to a customer's business to do additional work after he had serviced the customer's equipment. On June 11, 1987, Complainant received a "call back" from Our Lady of Lourdes Hospital to correct a loose connection after a service call. Such "call backs" are not uncommon for service engineers.

9) Riki Foster, one of Respondent's salespersons, heard a complaint in early August 1987 from Providence Milwaukie Hospital that one of its female employees felt intimidated by Complainant. Foster told Wilson and Smallwood about the complaint.

10) During the fiscal year that ended on June 30, 1987, Respondent suffered financial losses. During July, Charles Wilson, Respondent's president, met with Doyal Eubank, Respondent's controller, and Smallwood about the losses. Wilson decided to cut back the number of employees. Three employees were terminated on or around August 14, 1987.

11) Complainant sustained an on-the-job injury on or about August 17, 1987.

12) Complainant was injured when an X-ray transformer slid forward in the van he was driving, striking him in the back. He suffered pain in his back and neck. Complainant finished the service call he was making and then returned to Eugene from Portland, arriving around 10 p.m.

13) The next morning, on August 18, Complainant told Smallwood about the accident and his injury. Wilson later called Complainant into his office. He and Complainant talked about Complainant's performance, and Wilson told Complainant that he needed to round out his knowledge of the equipment. Wilson did not mention any customer complaints concerning Complainant. Complainant told Wilson about his injury. Wilson said that it was probably just a muscle strain and to wait a few days to see how it felt. Complainant said he wanted to go to a doctor. Wilson said he did not want Complainant to file a workers' compensation claim because it would make Respondent's insurance rates go up.

14) Later on August 18, 1987, Complainant went to a doctor. He was not released to return to work.

15) After visiting the doctor, Complainant returned to Respondent and got a workers' compensation insurance claim form from Eubank. Respondent did not dispute the claim, which was submitted to and accepted by Respondent's insurer, SAIF Corporation. His claim was for a mid-dorsal

cervical strain. Between August 18 and September 1, 1987, Complainant saw his doctor approximately six times. Complainant was given medical compensation and paid for time loss through August 31, 1987.

16) On or about September 1, 1987, Complainant was released for full duty by his physician and returned to work.

17) On September 1, 1987, Complainant gave his work release to Eubank. Later he met with Wilson and Smallwood, who told him that there had been complaints about his performance from two customers: The Eugene Clinic and Providence Milwaukie Hospital. Wilson instructed Complainant not to go to those customers again. Before his injury, Complainant had not been told of any customer complaints. Complainant signed a memorandum dated August 24, 1987, confirming that meeting. Complainant had not worked on August 24.

18) Between September 1 and September 10, 1987, Respondent did not say anything to Complainant about his work performance. Complainant did not miss any work during that period. Complainant was never told there was an over staffing problem regarding his position.

19) On or about September 10, 1987, Complainant was discharged from his employment with Respondent.

20) Wilson called Complainant into his office, where they met with Smallwood and Eubank. Wilson said that two complaints were too many, and he terminated Complainant. No mention was made of an over staffing problem or of Complainant's workers' compensation claim.

21) Complainant applied for and was awarded unemployment compensation. Eubank stated to the Employment Division that Complainant was discharged because three of Respondent's accounts asked to not have Complainant service them any longer.

22) Complainant applied for employment to around 40 employers before he found a job on January 13, 1988. From that job he earned $7.50 per hour, and was still employed there at the time of hearing.

23) Before he was discharged by Respondent, Complainant had never been fired before. He was upset by being fired, and by having to tell potential employers about it. Complainant was self supporting when he was fired. He became depressed and disappointed with himself while he could not find work. He spent nearly three months looking for a new job.

24) The testimony of Robert Smallwood was not credible. His testimony contained inconsistencies that only became magnified as he attempted to offer explanations. For example, he gave inconsistent statements about training Complainant and evaluating his work. He testified that Complainant's "call backs" showed he did not know what he was doing. He said Complainant lacked knowledge about reading a schematic – the electronic "road map" of a piece of equipment. However the only credible evidence offered of a call back was from the Lady of Lourdes Hospital; Complainant was called back because a connection was loose after he had changed a CPU board, waited for an hour to check for problems, and left with the "equipment up and functional." A loose connection is no evidence that Complainant was incompetent or lacked knowledge about his job. Smallwood's own testimony was that there were no complaints about Complainant's work during his first 90 days, and Smallwood evaluated his department weekly. The complaints specified by Respondent – from The Eugene Clinic and Providence Milwaukie Hospital – did not involve Complainant's technical competence. The complaint from the Clinic involved Complainant's lack of patience, and the complaint from the Hospital was that a woman was intimidated by him. On this record the Forum cannot reconcile the absence of evidence of complaints about Complainant's technical skills and Smallwood's assertion that Complainant did not know what he was doing. In addition, credible evidence showed that the complaint from The Eugene Clinic came shortly after Complainant started working for Respondent, which was March 2, 1987. This contradicts Smallwood's testimony about when the complaint was received, since Complainant was not told about it until September 1, 1987. Wilson was the owner of Respondent, and Smallwood was Wilson's son-in-law. From that relationship bias was inferred. Because his testimony was not credible, it was given less weight whenever it conflicted with other credible evidence on the record. In some cases, it was not believed even when it was not controverted by other evidence.

25) The testimony of Charles Wilson was not credible. He testified that he had no memory of the meeting with Complainant on August 18, and did not believe it took place. He denied that he discouraged Complainant from seeing a doctor or that he said he did not want Complainant to file a workers' compensation claim. His testimony was not credible because it was directly contradicted by his handwritten memo dated August 18, 8:30 a.m., which states, "Did interview with Nick. He says he has whip lash from transformer bumping into the back of his seat * * *." In addition, his testimony was contradicted by that of Complainant, whose testimony was credible and was corroborated by Wilson's memo. Wilson's and Smallwood's assertion that Complainant was terminated because Respondent was over staffed is inconsistent with what Eubank told the Employment Division regarding the reason for Complainant's discharge. It also seemed questionable since Respondent discharged three employees around August 14 for the stated reason of being over staffed, and Complainant was not discharged then. Respondent did not tell Complainant that over staffing was one of the reasons for his discharge. Respondent introduced no evidence that any other employee was discharged on September 10, 1987. Wilson's memory also failed when asked about an interview he gave to the Agency's investigator. During the interview, Wilson was irate, uncooperative, and revealed a hostile attitude toward Complainant. Because his testimony was not credible, it was given less weight whenever it conflicted with other credible evidence on the record. In some cases, it was not believed even when it was not controverted by other evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent employed six or more persons within the state of Oregon.

2) Complainant was a worker employed by Respondent.

3) On August 17, 1987, Complainant was injured while on the job. On August 18, 1987, Complainant notified Respondent of the injury and sought medical treatment. He applied for benefits under the Oregon workers' compensation procedures for his injury. His application was accepted and he received benefits in accordance with the Oregon workers' compensation procedures.

4) Complainant was fully released by his treating physician to return to his former job. Respondent reinstated Complainant to his former job, where Complainant worked for 10 days before he was discharged by Respondent on September 10, 1987.

5) Respondent discharged Complainant because he was an injured worker who had utilized the procedures of Oregon's workers' compensation law.

6) Complainant lost wages of $4,500 due to the discharge ($6.25 per hour times 40 hours per week equals $250 per week, times 18 weeks between September 10, 1987, and January 13, 1988).

7) Complainant was upset due to the discharge by Respondent, the resulting loss of income, and the difficulties associated with trying to find a new job, and having to tell prospective employers about his discharge.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) Between March 2, 1987, and September 10, 1987, Complainant was Respondent's "worker," as that term is used in ORS 659.410 and OAR 839-06-105.

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

4) The actions, inactions, and knowledge of Charles Wilson, an employee of Respondent, are properly imputed to Respondent.

5) ORS 659.410 provides:

> "It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.807, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

Respondent violated ORS 659.410.

6) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 659.400 to 659.435, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

In order to prevail in this matter, the Agency must prove the following four elements:

(1) The Respondent is a Respondent as defined by statute;

(2) The Complainant is a member of a protected class;

(3) The Complainant was harmed by an action of the Respondent;

(4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

Regarding the first three elements, credible evidence showed that:

(1) Respondent was an employer that employed six or more persons in Oregon (*see* ORS 659.010(11) and (12), 659.400(1), and OAR 839-06-115).

(2) Complainant was a worker employed by the Respondent (*see* OAR 839-06-105(4)(a)). He became a member of a protected class as soon as he reported his on-the-job injury to Respondent, and thereby invoked the procedures provided for in the workers' compensation law (*see* OAR 839-06-105(2)). In addition, Complainant applied for and received benefits provided for in Oregon's workers' compensation law.

(3) Respondent terminated Complainant on September 10, 1987. The termination, which is covered under ORS 659.410 by the word "tenure," harmed Complainant both financially and by causing him to be upset and lose self-esteem.

Regarding the fourth element, that is, the causal connection between Respondent's action and Complainant's membership in the protected class, the Forum applied the Different or Unequal Treatment Test set forth in OAR 839-05-010(2)(b). Credible evidence on the record showed that on August 18, 1987, Respondent's president, Charles Wilson, attempted to dissuade Complainant from visiting the doctor and filing a workers' compensation claim; Wilson expressed concern that Respondent's insurance rates would be increased if Complainant did so. Evidence showed that Complainant did not follow Wilson's direction, but went to a doctor and filed a claim that same day. After being released to return to work on September 1, 1987, Respondent informed Complainant of two customer complaints about his work, and advised him to correct the problem. Ten days later, with no evidence of additional complaints or problems, Respondent discharged Complainant. The evidence showed that one of the complaints, which was in the nature of constructive criticism, was made to Respondent soon after Complainant started work on March 2, 1987. Complainant was not notified of that complaint until September 1. No credible evidence showed that other workers, who were not members of Complainant's protected class, were terminated after two customer complaints, under circumstances like those leading up to Complainant's discharge.

These facts permit a reasonable inference that Respondent's

employment decision – to discharge Complainant – was caused by Complainant's protected class membership.

Respondent produced evidence to show that it acted upon legitimate, nondiscriminatory factors. Respondent asserted that it was over staffed and was discharging its least valuable employees. It asserted that Complainant had several customer complaints and that he had a bad attitude about the company. Wilson denied making comments intended to dissuade Complainant from filing a workers' compensation claim. Smallwood testified that Complainant did not know what he was doing, and parroted Wilson's position that Respondent was over staffed.

The Forum found Respondent's stated reasons were a pretext for discrimination. *See* Findings of Fact numbers 24 and 25. As noted in the credibility determinations, Respondent's stated reasons that it was over staffed and that Complainant was not doing his job properly were unworthy of credence. Respondent's assertion that Complainant was discharged because of customer complaints about his work was not persuasive. The complaint from The Eugene Clinic was made soon after Complainant started work, which was months before he was advised about it on September 1, 1987. The complaint from Providence Milwaukie Hospital was made sometime in early August 1987, and Complainant was not advised about it also until September 1. Assuming these two complaints were sufficient grounds, as asserted, for Respondent to terminate Complainant, it is striking that Respondent did not discharge him on August 14, 1987, when three other employees were discharged due to over staffing. Instead the facts showed that Complainant was not told of the complaints until after he returned from his on-the-job injury, and then was discharged 10 days later without any evidence of additional problems. The credible evidence on the whole record was sufficient to persuade the Forum that Respondent terminated Complainant because of his membership in the protected class.

Damages

This Forum has long held that unemployment benefits received by a successful complainant in an employment discrimination case are not offsets against a back pay award. *See In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 64-65, 67 (1987), *aff'd Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988), and the cases cited therein. To the limited extent that *In the Matter of Sierra Tile Manufacturing, Inc.*, 1 BOLI 291(1980), and *In the Matter of Day Trucking, Inc.*, 2 BOLI 83 (1981) are inconsistent with the first sentence of this paragraph, those cases are hereby overruled.

Respondent argued at hearing that Complainant did not receive his gross earnings each payday, rather he received his earnings minus legal deductions. It appeared Respondent was suggesting that Complainant's back pay should not be computed based on his gross pay; instead, it should be based upon his net earnings.

Because some of Oregon's civil rights laws are modeled after federal civil rights laws, the Commissioner has often looked to federal case law for guidance in interpreting and administering Oregon's laws.

> "Back pay awards reflect total earnings. Overtime, shift differentials, and premium pay are included in addition to 'straight-time' pay. Awards may be made net of work expenses that the plaintiff would have had to incur if employed. Where the court found some basis for concluding that the plaintiff would have obtained them, raises and promotions have been included in back pay awards. Fringe benefits, such as sick pay, medical insurance premiums or medical expenses incurred upon the lapse of insurance, vacation pay, pension and retirement benefits, uniform cleaning allowance, travel allowances, temporary housing allowances, savings plan contributions, life insurance, and profit sharing, have been included in many back pay awards." (Footnotes omitted.) B. Schlei and P. Grossman, *Employment Discrimination Law* 1440-41 (2d ed. 1983).

Thus, under federal law, back pay awards are initially computed based upon the employee's total earnings, before any deductions or offsets. Regarding taxes:

> "Employer-paid back pay, whether paid as part of a settlement or in satisfaction of a judgment, constitutes wages for purposes of FICA (Social Security), FUTA (unemployment insurance), and federal income tax withholding. The leading case is *Social Security Board v. Nierotko,* which involved an NLRB award. The same rule has been applied, however, in Title VII and ADEA contexts. Amounts paid in lieu of pension or other fringe benefits are also treated as back pay." (Footnotes omitted.) *Id.* at 1449.

The Commissioner has previously allowed deductions from a back pay award for "any appropriate legal deductions * * *." *In the Matter of Sierra Tile Manufacturing, Inc.*, 1 BOLI 291, 294 (1980). The Order below allows Respondent to make such deductions, as provided in ORS 652.610.

Exceptions

Respondent filed exceptions to the Proposed Order. Several of the exceptions challenged the Hearings Referee's credibility determinations about evidence or witnesses. A hearings referee's credibility findings are accorded substantial deference by this Forum. Absent convincing reasons for rejecting such findings, they are not disturbed. Here, Respondent presented no reasons in support of its exceptions to the credibility findings. Accordingly, those findings remain unchanged.

Proposed Findings of Fact numbers 14, 15, and 25 were slightly altered in response to Respondent's exceptions. Respondent's remaining exceptions were not supported by the facts and were not persuasive.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of

Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for NICODEMUS H. NEPPER, in the amount of:

a) FOUR THOUSAND FIVE HUNDRED DOLLARS ($4,500), representing wages Complainant lost as a result of Respondent's unlawful practice found herein, minus any appropriate legal deductions; PLUS,

b) SIX HUNDRED FIFTY DOLLARS and FIFTY-FOUR CENTS ($650.54), representing interest on the lost wages, as they would have been earned, at the annual rate of nine percent accrued between October 1, 1987, and June 30, 1989, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between July 1, 1989, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) THREE THOUSAND DOLLARS ($3,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of this Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any worker who applies for benefits under, gives testimony in connection with, invokes, or uses the Oregon workers' compensation procedures, or who gives testimony in connection with or uses the civil rights procedures provided in ORS 659.410 - 659.435.

3) Post in a conspicuous place on the premises of Western Medical Systems, Inc. a copy of ORS 659.410, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

4) Adopt a non-discriminatory policy and practice regarding employee discipline and termination procedures.

In the Matter of
BAKER TRUCK CORRAL, INC.,
Respondent.

Case Number 15-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued September 26, 1989.

SYNOPSIS

Respondent discharged Complainant due to her pregnancy, and not because Respondent perceived her to be impaired due to overweight. Respondent's asserted reason for the discharge (poor performance) was pretextual. The Commissioner awarded Complainant back wages and damages for mental suffering. ORS 659.029, 659.030(1)(a), 659.425(1)(c); OAR 839-07-525.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on February 22, 23, and 24, 1989, in the County Court Chambers, Main Floor, Baker County Courthouse, 1995 Third Street, Baker, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, introduced documents, and submitted a written post-hearing summary. The Baker Truck Corral, Inc. (hereinafter the Respondent), was represented by Floyd C. Vaughn, Attorney at Law, Baker, and Phillip S. Oberrecht, Attorney at Law, Boise, Idaho. Respondent's counsel presented a Summary of the Case, argued the law and facts, interposed objections and motions, examined the witnesses, introduced documents, and submitted written post-hearing argument. Tina Carpenter (hereinafter the Complainant) was present throughout the hearing.

The Agency called as witnesses the following: Pat Clark, an Investigative Supervisor with the Agency (by telephone); Richard Gomez, a Wage and Hour employee of the Agency (by telephone); Murray McNeill, formerly a Senior Investigator with the Agency (by telephone); Susan Moxley, a Senior Investigator with the Agency; Jasen Carpenter, Complainant's husband; the Complainant; Candi Carnell and Nita Hendrickson, customers of Respondent; and Ann Marie Allison, Betty Borgan, Theresa (Grove) Carpenter, Bonnie Chandler, Mary Minton, Judy Osborn, and Sharon Smitheart, current or former employees of Respondent.

The Respondent called as witnesses Blaine Barnes and Marlene Butt, both former employees of Respondent (both by telephone); John Bootsma, president and part owner of Respondent corporation; Mark Eastland, Respondent's restaurant manager at times material; Edna Gaiwith, Carrie (Walker) Noble, Esther Walker, and Cynthia Stephens, current or former employees of Respondent; and Tamara Townsley, Respondent's station manager and restaurant co-manager at times material. In addition, the Respondent submitted the affidavit of former employee Jenel Van Cleave.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 15, 1987, the Complainant filed a verified complaint with the Agency, and on September 27, 1987, the Complainant filed an amended verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of the Respondent.

2) After investigation and review, the Civil Rights Division issued an

Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding the Respondent in violation of ORS 659.030(1)(a) and 659.425(1)(c).

3) Pat Clark, an investigative supervisor for the Agency, approved the Administrative Determination prepared by the investigator, Susan Moxley, and subsequently initiated conciliation efforts between the Complainant and the Respondent on or about February 26, 1988. On May 26, 1988, she concluded that conciliation had failed and referred the case to the Agency's Quality Assurance Unit for further action.

4) On November 9, 1988, the Agency prepared and served on the Respondent Specific Charges herein, alleging that the Respondent terminated Complainant's employment due to her pregnancy and/or due to Respondent's perception and treatment of Complainant as being impaired due to overweight, in violation of ORS 659.030(1)(a) and ORS 659.425(1)(c).

5) With the Specific Charges, the Forum served on the Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On December 1, 1988, the Respondent, through counsel, timely filed an answer to said Specific Charges.

7) On December 5, 1988, the Forum changed the location of the hearing from the Support Enforcement Division Conference Room, 700 S.E. Emigrant, Pendleton, to Suite 240 at the same address.

8) On December 8, 1988, the Respondent filed a motion for postponement, based on the unavailability of one of Respondent's principal witnesses; the Agency did not oppose the motion.

9) On December 8, 1988, the Hearings Referee found good cause for the requested postponement and reset the hearing for 9 a.m., February 22, 1989, at the same location. An amended notice of hearing to this effect was issued on December 14, 1988.

10) On December 14, 1988, the Respondent filed a motion to associate counsel, and on December 15, 1988, the Hearings Referee ruled pursuant to applicable statute that Mr. Oberrecht, a member of the Idaho Bar, could appear as co-counsel for Respondent herein.

11) On January 17, 1989, the Respondent filed a motion to amend pleading and an amended answer, and on January 18 the Hearings Referee granted the motion and ruled that the amended answer stand as Respondent's response to the Specific Charges.

12) On January 23, 1989, the Respondent filed a motion to change venue, setting forth several reasons why the contested case hearing should be moved to Baker from Pendleton. The Hearings Referee thereafter requested a response from the Agency regarding the location change, and being advised that the Agency joined in the motion, ruled on January 26, 1989, that the location of the hearing be changed from Pendleton to the County Court Chambers, Main Floor, Baker County Courthouse, 1995 Third Street, Baker, Oregon, at the previously determined date and time.

13) Pursuant to OAR 839-30-071, on February 13, 1989, both the Agency and the Respondent timely filed a Summary of the Case.

14) At the commencement of the hearing, the Respondent's counsel stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

15) Pursuant to ORS 183.415(7), the Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) At the close of the evidentiary hearing on February 24, 1989, at the suggestion of the Hearings Referee, oral argument was waived in lieu of the simultaneous submission by the Respondent and the Agency of post-hearing memoranda within 10 days; the record herein closed on March 9, 1989, upon receipt by the Forum of the timely post-marked Post Hearing Memorandum of the Respondent.

17) A Proposed Order in this case was issued on August 11, 1989. Exceptions, if any, were to be received and/or postmarked by September 5, 1989. Exceptions have not been received by the Hearings Unit in this case.

FINDINGS OF FACT – THE MERITS

1) The Respondent Baker Truck Corral, Inc., is an Oregon corporation operating a restaurant and service station in Baker, Oregon, and utilizing the personal services of six or more employees at all times material herein.

2) The Complainant was employed by the Respondent for a period in 1981 when she was about 13 years old, and worked for the Respondent after school and summers periodically thereafter. Beginning in early 1985, she worked regularly as a waitress. Her last day of work was February 28, 1987.

3) From 1985 until February 28, 1987, the Complainant's rate of pay was $3.35 per hour. She worked varying shifts, sometimes part time and sometimes full time as a waitress.

4) In addition to her hourly wage, the Complainant received tip income for a full shift of $20.00 on swing shift, $20.00 to $25.00 on graveyard shift, and $30.00 to $50.00 on day shift.

5) The Complainant is a large woman; at the time of hire in 1985, she weighed 250 to 260 pounds, which weight she maintained throughout her 1985 to 1987 employment with the Respondent. She is about six feet tall.

6) Throughout her 1985 to 1987 employment with the Respondent, the Complainant actively participated in activities such as camping, fishing, walking, horseback riding, and all terrain vehicle riding.

7) The duties of the Respondent's waitresses included waiting tables, which consisted of providing menus to customers, taking their orders, relaying the orders to the kitchen, and

delivering the kitchen's output to the tables.

8) The duties of the Respondent's waitresses also included cashiering, bussing tables when needed, and doing "side work," which consisted of mopping the floor, filling salt, pepper, ketchup, cream, and sugar containers, checking the coffee machine and butter bowl, assuring a supply of juices, coffee filters, salad dressing and salad, among other things.

9) Which "side work" duties were required of a waitress was dependent upon the section that waitress was assigned. This work was usually done at or near the end of the shift.

10) Sometimes waitresses did not complete their side work. When that occurred, other waitresses "chipped in" and assisted.

11) The Complainant usually completed her side work and helped others complete their side work.

12) Those whom she assisted on occasion included Judy Osborn, Theresa Carpenter, Melody Haney, Jenel Van Cleave, Esther Walker, and Carrie Noble. The Complainant was at times assisted in completing her side work when she was so engaged or was busy with customers.

13) The Complainant understood that she could be disciplined or discharged for being late to work, for unexcused absences from work, for not waiting on customers, or for not doing side work.

14) During her employment with the Respondent from 1985 to 1987, the Complainant received no warnings about tardiness or absences or failure to do side work, or about spending too much time talking with customers.

15) Waitresses were entitled to take breaks during their shift, and meals were provided at a cost of $3.50 for employees. There was no set schedule for meals, and employees ate either on their break or at some other opportunity which did not interfere with their duties.

16) All employees, including the managers, ate during their shift, either a meal or a snack.

17) Mark Eastland managed the restaurant; Tamara Townsley was co-manager. Mr. Eastland and Ms. Townsley are husband and wife. In the restaurant they divided the personnel portion of their duties with Ms. Townsley dealing with the servers (usually female waitresses) and Mr. Eastland dealing with the cooks and busboys (usually male); this meant that he hired, fired, and disciplined the kitchen help and she hired, fired, and disciplined the waitresses.

18) John Bootsma was president of the Respondent corporation. He described himself as a minority stockholder. He dealt with the Bureau's Wage and Hour representative regarding compliance. He spoke to both Agency investigators regarding the Complainant's complaint, once on a call he initiated and once with a second Respondent representative on the line. He did not deal in the day-to-day handling of employees, but was concerned with the financial status of the restaurant operation. He was deferred to by the Respondent's employees as "the boss"; he expected such deference in his dealings in the restaurant.

19) During most of the time material herein, Baker Truck Corral operated the restaurant and the adjoining convenience store and service station. Mark Eastland had primary responsibility for the restaurant, with Tamara Townsley as co-manager. Ms. Townsley had primary responsibility for the convenience store and service station, referred to collectively as "the station." The station was leased to Poole Brothers in January 1987.

20) During December 1986 and January 1987, Ms. Townsley was occupied with the transition of the station to a lease arrangement. Following the remodeling closure of the restaurant around mid-January, she concentrated on the restaurant. Generally, she was on the premises during the swing shift after the remodeling.

21) Ms. Townsley and Mr. Eastland were the cognizant managers who hired, evaluated, assigned, scheduled, excused, and disciplined the restaurant employees of the Respondent, including the Complainant.

22) Rarely, some customers wrote complimentary comments on tickets regarding the waitresses; these ended up with Ms. Townsley. There were at least five or six such comments about the Complainant. The waitresses sometimes shared these among themselves.

23) The waitresses believed that a good waitress is alert, courteous, pleasant, and friendly; gives quick, timely service; is friendly and outgoing, and has a good memory for customers in order to recognize them; engages in small talk and visits with the customers; handles volume, gets the order in and the food out, keeps the coffee cup filled, and does the required side work.

24) The Complainant had many of the named qualities of a good waitress in that she was as fast as the average waitress, a stepsaver who kept up and gave timely service; she hustled and was not slow; she could move fast and was a good waitress and a good worker; she was pleasant, friendly, attentive, engaged in conversation with customers, and appeared to like her job; she did her side work, was always cooperative and assisted others; she never hung back like others; and she waited on rude or problem customers and was especially effective with older people. She was good enough to keep the job and move to day shift. There were no customer complaints.

25) Visiting and small talk with customers was part of the job as a waitress. One waitress was cautioned by Ms. Townsley for not engaging in such conversation with customers.

26) Regular customers found the Complainant to be a personable, gracious waitress, who recognized and remembered customers and always gave good to excellent service. They observed no slowdown or other physical problem after she became pregnant.

27) A few co-workers found the Complainant was slow, sometimes didn't complete her sidework, and spent more time chatting with customers than they thought was proper. They did not report their views to management.

28) Ms. Townsley had hired and previously evaluated the Complainant;

her evaluation of the Complainant in 1985 was, overall, superior.

29) The Complainant had been a good waitress in the past; she had to be to last seven years.

30) Following her marriage, the Complainant asked that her hours of employment per week be reduced. Her intent was to spend more time in the home. The Respondent accommodated her request, and she worked three, and occasionally four, shifts per week from approximately mid-May to October 1986.

31) Due to remodeling, the restaurant was closed for approximately one week in January 1987.

32) Beginning in October 1986, the Complainant worked over three shifts most weeks, partly on day shift, and following the January 1987 temporary closure of the Baker Truck Corral, she averaged 36 hours per week on day shift until her termination.

33) At Baker Truck Corral, new waitresses generally start on graveyard shift. When an opening occurs on swing, they are moved there. From swing, if a day shift opening occurs, they move there. Day shift is the preferred shift as it has better hours and more tip money. The best waitresses move there.

34) Moving an employee from another shift to the graveyard shift was a form of discipline included in respondent's policies.

35) The waitress work force at Respondent's restaurant frequently commented on the actions and characteristics of fellow employees, "each new waitress had to go through it," and they "all complain about everybody." Gossip and rumor were common.

36) The Complainant learned in January 1987 that she was pregnant. She immediately told her husband, who had accompanied her to the doctor's office.

37) On the same day, upon returning from the doctor the Complainant telephoned Tamara Townsley and told her that she (Complainant) was expecting a baby in September.

38) The Complainant told Ms. Townsley that the doctor had said she could continue working throughout the pregnancy. She was not asked for verification from the doctor. Ms. Townsley appeared to be happy for the Complainant.

39) The Complainant was scheduled to work the following day and did so. She suffered no physical problems due to the pregnancy at that time or later that interfered with her job. She had no morning sickness.

40) The Complainant told Mr. Eastland of her pregnancy the next day, and she told Mr. Bootsma within one to two weeks after she knew. She told everybody at the restaurant.

41) Following the example of another pregnant employee, Carrie Noble, due to a belief that lifting might hurt the baby, the Complainant attempted to avoid lifting at work during her pregnancy.

42) The Complainant never complained, either to customers or coworkers, about feeling ill due to pregnancy while she worked for the Respondent.

43) The Complainant did complain, both before and during her pregnancy, about her feet hurting, as did other waitresses.

44) In late January 1987, Mr. Bootsma came to the restaurant for morning coffee. When he received no service at the counter, he poured his own coffee and told Mr. Eastland to do something about the lack of service.

45) Mr. Bootsma had a similar experience about 1½ weeks later. He again told Mr. Eastland, who became upset because Mr. Bootsma was upset. Mr. Bootsma saw the Complainant at the back table in the kitchen with food. She was not feeling good. He told Mr. Eastland "If she is well enough to eat, she is well enough to work; take care of it."

46) The Complainant was on break when Mr. Bootsma found her eating. Either Melody Haney or Jenel Van Cleave was to cover her area, so that she could later cover their break.

47) Mr. Bootsma had remarked that he would have to go across the street to eat. The Complainant thought it was a joke. Mr. Bootsma never had to wait for service. The employees were afraid of him. He usually got his own cup, then visited at the counter or in the kitchen.

48) On a third occasion, Mr. Bootsma again waited for his coffee. He observed at that time that the Complainant didn't appear to feel well.

49) Mr. Bootsma told both Ms. Townsley and Mr. Eastland to get rid of anyone not doing the job.

50) Mr. Bootsma was in the Complainant's service area on each of the three occasions. Mr. Eastland said he instructed Ms. Smitheart to deal with it. He did tell the Complainant to "get going."

51) Mr. Eastland frequently and generally told the work force to "get it going, get the food out, let's get moving."

52) Ms. Townsley had in the past been a supporter or advocate of women's issues and worked with battered women and rape victims. Since coming to Baker she had been involved in helping handicapped or developmentally disabled slow learners at Baker High School. She felt that the Complainant's allegations against her of handicap and sex discrimination were "ludicrous." She believed that the Complainant had been a good waitress when busy, and was a fair waitress overall, but spent too much time visiting and was lax in her sidework. She did not observe the Complainant's day shift performance, which was reported to her by Mr. Eastland, whom she believed had talked to the Complainant. She also thought that Ms. Smitheart had talked to the Complainant about sidework.

53) Annette Smitheart worked for the Respondent from 1984 to May 1987. She was initially hired by Mr. Eastland as a cook; she later assisted in managing the restaurant. She could not hire or discipline employees or schedule work. She did monitor employee attendance, and employee performance as to side work and customer service. She was to report deficiencies in performance which went uncorrected to Ms. Townsley or Mr. Eastland.

54) Ms. Smitheart never had to speak to the Complainant concerning deficiencies, and never reported any

such deficiencies to Ms. Townsley or Mr. Eastland. She received no complaints regarding the Complainant's performance from either Ms. Townsley or Mr. Eastland, and recalled no discussion of the Complainant's performance with either of them. She found that the Complainant did her job, was cooperative, and did anything she was asked. The Complainant never refused to substitute for an absent waitress.

55) Betty Borgan worked for the Respondent from 1984 to January 1987. She assisted in managing the restaurant, sometimes with Ms. Smitheart when Ms. Townsley and Mr. Eastland had days off. She made bank deposits, tabulated food tickets, and took care of problems with the waitresses. She had no customer complaints about the Complainant and none from Ms. Townsley or Mr. Eastland.

56) Ms. Smitheart never discussed individual performance with the Complainant. Neither did Ms. Townsley. They discussed customer awareness and teamwork in giving good service with all waitresses at a waitress meeting in January 1987.

57) The Complainant was working a day shift on a Sunday subsequent to the day upon which she informed Ms. Townsley of the pregnancy. She had begun taking her "prenatal vitamins" and had done so on an empty stomach. She became nauseous as a result, vomited, and then finished her shift.

58) About two or three days later, the Complainant had the flu and went home from work sick.

59) The intestinal upset continued and at about 5 a.m. the next morning, the Complainant called Ms. Townsley at home to report that she could not work her scheduled day shift.

60) That evening, Ms. Townsley called the Complainant and asked how she was feeling. The Complainant said she was better and would be in the next morning. She had again been scheduled to work the day shift.

61) Ms. Townsley instructed her not to report for work the next morning but rather to come talk to her in the afternoon.

62) The instruction not to report to work but rather meet later with Ms. Townsley caused the Complainant to fear for her job and put her in tears.

63) When the Complainant and Ms. Townsley met the next afternoon, approximately February 20, 1987, Ms. Townsley told the Complainant that she didn't think that it would be good for the Complainant or the baby for the Complainant to continue working, that she didn't think the Complainant could handle the work, that the Complainant was already heavy and would get heavier, and that she was being laid off.

64) Ms. Townsley said she would report "lack of work" for unemployment insurance purposes, and in response to the Complainant's inquiry said that she would call the Complainant if needed for part-time work in the summer. She told the Complainant she could return if she lost weight.

65) A longhand comment in the Complainant's personnel file was written after February 28, 1987, by Ms. Townsley. In its entirety, it reads:

"2/28/87 Laid off. Moves slow & sick & in bathroom constantly.

"4-27-87 Filed discrimination suit against B.T.C."

The February 28 entry was based on information provided by Mr. Eastland. The quoted comment is the only written document regarding the Complainant's job performance other than the 1985 evaluation. Ms. Townsley testified that she had begun keeping such documentation on all waitresses.

66) The Complainant was upset and distressed at losing her job. She returned home after her meeting with Ms. Townsley in a very upset state, crying.

67) The Complainant told her husband that Ms. Townsley had fired her. When he asked why, the Complainant cried for several minutes, then stated that Ms. Townsley thought she was overweight and that for her to continue working would hurt the baby.

68) Until she was told not to report to her scheduled shift, but rather to meet with Ms. Townsley later in the day, the Complainant had not considered that her job might be in jeopardy. At most she had feared that she would have to "start over" on graveyard after delivery. The sudden nature of her termination was a shock. She also felt humiliated, embarrassed, and demeaned by Ms. Townsley's reference to her weight and size.

69) The Complainant later felt further humiliated, embarrassed, and demeaned when she learned subsequent to the termination that the Respondent's managers had, during her employment (and prior to her pregnancy), commented negatively about her size to some of her co-workers.

70) In January 1987, Mr. Bootsma told Mr. Eastland to cut down on the help in order to reduce the corporate payroll.

71) At the time of the Complainant's termination, she had heard nothing about any cash flow problem of the Respondent and nothing about there being too many employees. There was a "Help Wanted" sign up the next day.

72) Mark Eastland preferred that waitresses put an order from each table up separately for the cooks, as it enabled an even flow in both the preparation and the serving of the food. Generally, several orders or orders from several tables were not be turned in at the same time.

73) Avoiding bunching or stacking orders was not always possible if the customers wanted separate checks or if the waitress was extremely busy.

74) The Complainant was not the only waitress to have difficulties with a cook over the bunching or stacking of orders; she was not the only waitress to have such difficulties with Blaine Barnes.

75) The Complainant observed that other waitresses were not criticized by Mr. Eastland for too many tickets at once, but that she was criticized for it on two or three occasions.

76) The last such criticism was on her last day on the job, February 28, after she had been given notice of her termination on or about February 20. Blaine Barnes, a cook, complained that the Complainant had stacked tickets and caused orders to back up. A loud

argument ensued between Mr. Barnes and the Complainant. Mr. Eastland reprimanded both, but believed that the Complainant caused the problem.

77) From the perspective of Blaine Barnes, the Complainant always and continuously stacked orders, "every day." He mentioned other waitresses who stacked orders to Ms. Townsley, which seemed to solve the problem. He never reported them to Mr. Eastland, and only reported the Complainant on the last day they worked together.

78) Controversy regarding the stacking of tickets depended on the individual cook and how well the cook and waitress worked together. The situation between Mr. Barnes and the Complainant was not daily, and was discounted by some co-workers as a personality conflict.

79) The Complainant telephoned the Pendleton office of the Agency in early March 1987. She told the person answering the phone that she had lost her job because she was pregnant and overweight. She also inquired about collecting her vacation pay.

80) In late March the Agency set up an appointment with the Complainant and on April 15, she went to the Pendleton office, where she filled out Agency intake forms.

81) The Complainant was present when Judy Osborn, a former co-worker, participated in a telephone unemployment compensation hearing shortly before April 15. Osborn had terminated her employment with Respondent January 21, 1987, and filed for unemployment compensation.

82) Ms. Townsley was a witness in the telephone hearing. Ms. Osborn overheard her to say, in reference to the Complainant:

> "Tina could not do the job. She was, she couldn't do it. She just could not move around on the floor. She was way overweight to begin with, and then she got pregnant, I mean it was impossible for her, it was hard for her * * *."

Ms. Osborn reported these remarks to the Complainant.

83) At hearing, Ms. Townsley testified to the effect that her comments in the unemployment proceeding regarding the Complainant's overweight and pregnancy were offered as possible reasons for the described performance deficiencies, and were not intended as statements of her motivation for discharging the Complainant. She stated that at the time of the layoff, she did not know why the Complainant was not performing satisfactorily and, although she left the discussion with the Complainant open for an explanation, the Complainant did not give one. She did not ask the Complainant directly for reasons that she was not keeping up or for an explanation of any customer complaints, including those of Mr. Bootsma. She stated that she didn't explore with the Complainant any solutions short of layoff for the performance deficiencies because the Complainant had offered no explanation. She stated that she told the Complainant that she could return when the Complainant felt she could again handle the job. She stated that she had in the past warned other waitresses about too much time visiting with customers, but she had never discussed that issue with the Complainant. She stated she had terminated other waitresses for not getting food out, for being slow, and reprimanded other waitresses for talking too much with customers, but she was unable to name them.

84) Edna Gaiwith worked at Baker Truck Corral from 1980 to 1983. She worked some shifts "off and on" with the Complainant, who was then in high school. In her opinion, the Complainant was slow, talked too much, and was "not on the ball." As a customer in late 1986 and early 1987, she observed that the Complainant was friendly, but stood and talked too much, and "never got her work done." She knew in January 1987 that Complainant was pregnant, and observed several instances of "morning sickness." Ms. Gaiwith generally got good service from the Complainant.

85) Carol Guthridge during the investigation gave the Agency a statement that she worked with the Complainant on graveyard for a time, that the Complainant did not do good job because of her weight, that after Complainant became pregnant she put on a lot more weight, and that the Complainant called in sick for day shift "three or four times" only one-half hour before the start of the shift. Guthridge states she was present each time, finishing graveyard shift. She further stated that the Complainant called in sick frequently after she became pregnant.

86) Guthridge appears on the incomplete 1985 -early 1986 work schedules a total of 21 hours with the Complainant. She does not appear after March 1986, until she appears a total of five times, February 8, 20, 21, 27, and 28, 1987, on the graveyard shift immediately preceding Complainant's day shift, after Complainant learned of her pregnancy.

87) The Complainant had no instance of illness, whether from "morning sickness" or other cause, following the February 20 notice to her of her pending termination.

88) Jenel Van Cleave and Melody Haney were waitresses at the Baker Truck Corral during times material. They were negative about the Complainant and the Complainant's work to co-workers as well as to management.

89) Marlene Butt testified that she worked for the Respondent as a waitress from August 1987 to September 1988 (available records suggest a start date of August 1986). She was hired by Ms. Townsley. During her employment she weighed 215 pounds, and she is 5 feet, 3½ inches in height. She detected no adverse treatment regarding her weight.

90) From time to time, the Respondent employed other overweight waitresses. With the exception of Ms. Butt, the record does not reflect the basis for considering them "overweight," nor are they identified.

91) At least two employees of the Respondent, Carrie Noble and Kathy Carpenter, continued working throughout their respective pregnancies.

92) During the Agency investigation of the Complainant's allegations, each of the Agency investigators interviewed witnesses and made notes of the interview, which was later reduced to a summary of relevant information. The final summary of the interview was not verbatim, but included those items

the investigator believed important. Statements bearing directly on the issues in the case were recorded as accurately as memory would allow. The summary was usually compiled the same day or within a few days of the interview. The form of the questions asked were not always preserved. The summary was not submitted to the witness. The original notes were destroyed when the summary was completed. The length of the summary did not always reflect the length of the conversation it memorialized.

93) On or about April 27, 1987, Mr. Bootsma spoke with Investigator McNeill in response to the complaint filed by the Complainant. He denied that the Complainant's pregnancy was a factor. He said that her weight may have had something to do with her firing, but only as it related to her ability to do the job. He said that other employees complained regarding her performance, and that he did not know of her pregnancy when he told the manager to fire her.

94) In 1987, the Wage and Hour Division of the Agency conducted a compliance review of Respondent relative to the wage and hour laws. The Wage and Hour Division Compliance Specialist, Richard Gomez, made notes of his conversation with Mr. Bootsma. He later reduced the notes to a summary of the conversation. He retained the notes.

95) On or about September 8, 1987, Mr. Bootsma spoke with Compliance Specialist Gomez regarding the compliance review of Respondent's policy manual. He then volunteered comment on the Complainant's case. He stated that she was very heavy and spent a great deal of the time either eating or in the bathroom, and that he had wanted her discharged prior to Christmas. He stated she was part-time help only, and that he had other pregnant workers on the job.

96) On or about December 12, 1987, Investigator Moxley interviewed Ms. Townsley by telephone; Mr. Bootsma was also on the line. He stated that he had previously told Townsley and Eastland to fire the Complainant, that he had observed the Complainant spending time in the bathroom and eating in the kitchen, neglecting her customers. He said he did not understand how she could eat if she was sick. He stated that the Complainant was so large one wouldn't know if she was nine months pregnant. He stated others worked while pregnant without a problem, and that the Complainant was fired because she couldn't do her job.

97) In the December 12 interview with Investigator Moxley, Ms. Townsley acknowledged Mr. Bootsma's earlier request to terminate the Complainant, but could not specify a date for the request. She stated that the Complainant had done well at first and was very willing to cover shifts for co-workers. She said she first noticed that the Complainant was having problems keeping up in February 1987. By that time the Complainant had told her of the pregnancy and that the doctor would allow her to work.

98) On December 12, Ms. Townsley stated she had not offered the Complainant a slower shift because the Complainant had agreed she could not keep up. Ms. Townsley stated she may have mentioned the Complainant's weight, but she couldn't recall.

99) In 1986, prior to October, Ms. Townsley agreed with a waitress who remarked that the Complainant was so large she was hard to work around in a small area. She expressed the same opinion to the Agency investigator.

100) John Bootsma is an intelligent, highly motivated, action-oriented individual with other business interests, including real estate, in addition to his interest in the Respondent corporation. He immigrated from Holland at age 11. Despite his testimony that he sometimes had difficulty with making himself understood, the Forum found him articulate and that he spoke without noticeable accent. He is also volatile and impatient, and admitted "I'm kind of flighty" and that he doesn't always "know where I've been an hour before." He also admitted "I get impulsive" and that what he saw only periodically was not necessarily a sound basis for a good judgment. Nevertheless, at hearing, he characterized some of the statements attributed to him in his conversations with Ms. Moxley, particularly those regarding the Complainant's weight, as "slanderous", and "out of focus", and denied their content. He further stated that the summary of his conversation with Mr. Gomez was incorrect, although he didn't recall what was said. The Forum finds that Mr. Bootsma testified to his recollection of events, but that his recollection was not always credible. The Forum has accordingly credited only those portions of his testimony which are verified by or not inconsistent with other credible evidence in the record.

101) Ms. Townsley was the Respondent's contact person for the Agency investigation. Her recollection of the investigation was somewhat vague, particularly as to the contents of or reasons for her interviews by the Agency. She remembered the instance of Mr. Bootsma being on the line with her and the Agency investigator, but did not recall the substance of his remarks on weight, on his knowledge of the Complainant's pregnancy, on the employment of other pregnant waitresses, or the substance of what the investigator and Mr. Bootsma said to each other during that conversation; it was "a long time ago." Similarly, she had no recollection of a later conversation with the investigator, although she confirmed the accuracy of the investigator's record thereof.

102) Ms. Townsley's recollection of events surrounding the termination of the Complainant's employment, other than the particular day on which the Complainant was advised that her employment was terminated, was equally poor: she did not recall how she learned of the Complainant's pregnancy nor whether the Complainant phoned her in this regard, whether she was told of the Complainant's doctor's opinion that the Complainant could continue working while pregnant, whether she was informed that Mr. Bootsma wanted the Complainant terminated, or whether the Complainant's work performance had been the subject of discussion with the co-manager prior to the reopening in January 1987. According to her own testimony, she had limited opportunity to observe the Complainant's work performance in late 1986 and early 1987, due to her

other duties up to the remodeling closure and to working a different shift from the Complainant after the reopening. The Forum has accordingly credited only those portions of her testimony which are verified by or not inconsistent with other credible evidence in the record.

103) Mr. Eastland "worked the line" as a cook when necessary, perhaps twice or more a week. He was present during the day shift, overseeing the kitchen and the operation of the restaurant. In early 1987 he was assisted in the latter by Ms. Smitheart. He could not recall when or how he learned of the Complainant's pregnancy. He testified to a number of instances of illness or non-performance on the part of the Complainant, and to five or six customer complaints regarding the Complainant's service. He also was the individual who had to deal with Mr. Bootsma's pique over delayed service. He testified to the effect that the Complainant's stacking of orders was a cause of her termination. Because the confrontation with Mr. Barnes over the orders without question occurred on the Complainant's final day of employment, and she had without question been notified of her "layoff" seven to ten days prior, the Barnes incident does not hold up as a reason for the termination. Mr. Eastland's effort to rely on it casts serious doubt on his testimony, both as to motivation for termination and in other respects. The Forum has accordingly credited only those portions of his testimony which are verified by or not inconsistent with other credible evidence in the record.

104) The Complainant was nervous and scared at the time of her deposition, and had little time to review the events about which she was questioned; by the time of hearing she had thought about it more and remembered more.

105) Following February 28, 1987, the Complainant looked for work from March 1987 to September 1, 1987. She delivered her first child on September 19, 1987. Thereafter, she resumed her job search. She worked two weeks at York Park Grocery, earning $186.00. She quit because the job required lifting 50 pound boxes, and she was again pregnant. She continued looking for other work and worked at Oregon Trail Restaurant for about 2½ months, until a winter layoff October 10, 1988. On December 19, 1988, she delivered her second child. She was due to start a new job March 1, 1989, for which she was hired in December 1988. Her job search was generally confined to her area of work experience, the restaurant business.

106) The condition referred to as "morning sickness" is a common though not universal symptom of early pregnancy.

ULTIMATE FINDINGS OF FACT

1) The Respondent Baker Truck Corral, Inc. is an Oregon corporation operating a restaurant and service station in Baker, Oregon, and utilizing the personal services of six or more employees at all times material herein.

2) The Complainant Tina Carpenter was employed as a waitress at the Respondent's restaurant from early 1985 to February 28, 1987. She is a large woman. She weighed 250 to 260 pounds throughout her 1985 to 1987 employment with the Respondent. She is about six feet tall.

3) The Complainant learned she was pregnant in January 1987. She shared the news with co-workers and with the Respondent's management.

4) The Complainant started on swing shift, as do most others. Her performance of her waitress duties was satisfactory throughout the described period of employment. She was subjected to no discipline, and in January 1987 was assigned to the day shift, a preferred shift.

5) The Complainant had no morning sickness; she was ill twice in early February 1987 from causes other than pregnancy.

6) The restaurant's two co-managers and the corporate president, as agents of the Respondent, individually and in concert determined to discharge the Complainant. Each of them believed that the Complainant's weight impaired her job performance, and that she would not be able to perform at all with the added weight of the pregnancy.

7) The Respondent's proffered reasons for the discharge are pretextual and an attempt to avoid liability for a discriminatory discharge based on sex – pregnancy.

8) As a result of the Respondent's unlawful practice, the Complainant suffered wage loss and emotional distress. The Complainant remained unemployed following her discharge until after the birth of her first child.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in pertinent part:

"* * *

"(6) 'Employer' means any person * * * who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

"* * *

"(11) 'Person' includes one or more individuals [or] * * * corporations * * *.

"(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

ORS 659.400 provides in pertinent part:

"As used in ORS 659.400 to 659.435, unless the context requires otherwise

"(1) 'Employer' means any person who employs six or more persons * * *.

"(2) 'Handicapped person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(3) As used in subsection (2) of this section:

"(a) 'Major life activity' includes, but is not limited to * * * employment * * *.

"* * *

"(c) 'Is regarded as having an impairment' means that the individual:

"* * *

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

At all times material herein the Respondent was an employer subject to the pertinent provisions of ORS 659.010 to 659.435, of OAR 839-07-500 to 839-07-565, and of 839-06-200 to 839-06-255.

2) ORS 659.040 provides, in pertinent part:

"(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof. * * *"

OAR 839-07-515 provides:

"A person who claims to be aggrieved under laws prohibiting discrimination because of sex may file a complaint with the [Civil Rights] Division. (*See* OAR 839-03-025 and ORS 659.040.)"

ORS 659.435 provides, in pertinent part:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040 * * * the Commissioner of the Bureau of Labor and Industries * * * shall have the same enforcement powers, and * * * the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 * * *"

OAR 839-06-220 provides:

"An individual * * * who claims a violation of ORS 659.425, may file a complaint with the Civil Rights Division (*see* OAR 839-03-025 – Filing a complaint and ORS 659.435)"

ORS 659.050 provides, in pertinent part:

"(1) After the filing of any complaint under ORS 659.040 * * *, the commissioner shall cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents in the complaint the names of such persons may be added as respondents thereto. If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110 * * *."

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found.

3) ORS 659.030 provides, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

"* * *

"(a) For an employer, because of an individual's * * * sex * * * discharge from employment such individual * * *"

ORS 659.029 provides, in pertinent part:

"For purposes of ORS 659.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions * * *"

OAR 839-07-525 (1) (c) provides:

"An employer may not because of pregnancy * * * discharge * * * a woman who is qualified and able to perform * * *"

The conduct of Respondent Baker Truck Corral, Inc. in discharging the Complainant due to her pregnancy was a violation of ORS 659.030(1)(a).

4) The actions, inactions, statements, and motivations of John Bootsma are properly imputed to the Respondent herein. The actions, inactions, statements, and motivations of Tamara Townsley, and the actions, inactions, statements, and motivations of Mark Eastland are properly imputed to the Respondent herein.

5) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

Respondent's counsel went to great length to discredit the Agency investigators and thereby to discredit the investigation leading to the contested case proceeding. This was crucial to Respondent's position in view of the quoted remarks of the Respondent's agents. Counsel describes the statements attributed to Mr. Bootsma and Ms. Townsley as "double hearsay," but that does not make testimony regarding such statements, or the alleged statements themselves, inadmissible in an administrative contested case hearing. Indeed, statements by a party's agents which are against the party's interest are admissible in other forums as well. The reliability of and weight to be given to such testimony is within the purview of the trier of fact. Counsel may and did properly seek to persuade the Forum to disregard such evidence as suspect or unreliable; it is nonetheless admissible.

Regarding the reliability, counsel seems to emphasize the following:

1) Neither Agency investigator made verbatim transcripts of the subject interviews, recorded the substance of the questions asked, or retained the original notes made of the interview; neither offered the person interviewed the opportunity to inspect the investigator's summary of the interview and verify its accuracy.

2) The Agency investigation was adversarial and biased, accorded the Respondent only limited opportunity for explanation and response, and was a studied attempt to "get" the Baker Truck Corral, in that information given to the investigator was not pursued. As an example of investigative bias, counsel points to the amendment of the original administrative complaint to include an additional basis of discrimination.

In response, Agency staff denied any vendetta, pointed out time and distance limitations and high case loads and case completions, and the existence of "no cause" (no substantial evidence) findings in other cases. They testified that the interview and note-taking methods used were normal and standard, and acceptable to the Agency. There was no showing that any of the questioned interviews did not occur, or that the statements within them were concocted or manufactured. One investigator candidly admitted acceptance of rumor (from two different sources) as fact when she could have checked further; she also stated that it was not the only finding which influenced the Administrative Determination.

The legislative scheme for the handling and resolution of the initial administrative complaint of unlawful discrimination filed with the Commissioner is implemented by published administrative rules delegating the processing to the Agency. The statute provides for discretionary investigation. It does not prescribe any detailed investigatory method. The rules not only anticipate the use of investigative summaries, but provide that the Agency, upon request, provide the person interviewed with such a summary for verification and comment. The rules allow issuance of an Administrative Determination based upon witness statements and other relevant evidence. The evidence at hearing need not be exactly that used in the investigative finding, nor are the charges limited to the original complaint, so long as they are reasonably related to the type of discrimination involved. *School Dist. No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135, 1138 (1975). It would make no sense, legally or otherwise, absent a clear showing of intentional fraud on the part of the investigator, to prohibit the consideration of information gathered by the investigator, including prior inconsistent statements of a party, a party's agent, or any other witness. In the event of conciliation failure, the statute and rules anticipate a contested case proceeding in the nature of a trial *de novo* to allow the Commissioner to determine whether the evidence which can be adduced by the Agency at hearing will preponderate in the same direction as the evidence which the Agency considered "substantial."

The rules also provide for the amendment of the administrative complaint to add "new protected class bases related to the same discriminatory act alleged in the original complaint" at any time before specific charges are prepared for a contested case hearing. OAR 839-03-040(1). It would defeat the statutory purpose of eliminating unlawful employment practices to hold an unsophisticated, non-legally trained complainant to his or her initial allegation of the cause for aggrievement. Initial investigation following the filing may well show additional or different bases than that originally identified.

In the present case, the Complainant alleged initially that her employment with the Respondent was unlawfully terminated due to pregnancy, a condition peculiar to her sex. After some preliminary inquiry, the Agency suggested that the complaint be amended to allege handicap discrimination, based on the Respondent's view that the Complainant's overweight condition was an impairment when in fact it was not. This is not a demonstration of biased advocacy. Rather, it is an example of the Agency carrying out its duty to investigate. Amended complaints enable investigation and determination of multiple unlawful motivations in a timely manner. To address such issues serially or not at all could result in a complainant's loss of remedy in an otherwise meritorious case because of an erroneous or incomplete initial complaint.

Tina Carpenter worked as a waitress a number of years for the Respondent. Conflicting testimony from co-workers regarding her performance notwithstanding, the Respondent's counsel is correct in pointing out that the determinative, important evaluation of her performance is that of the employer. If the evidence showed that evaluation to be objective and free from prohibited considerations, the inquiry would be at an end. In the Forum's opinion, however, the proof adduced did not show that the employer's decision to discharge* her was made without regard to her weight or pregnancy.

The Complainant was considered a satisfactory employee, at least up to January 1987. The Forum largely discounts testimony regarding her deficiencies in 1986: she not only remained employed but was placed on the day shift. Descriptions of marginal performance are inconsistent with those unquestioned facts.

The Respondent's reasons for the Complainant's discharge appear to be after-the-fact rationalizations. It is difficult for the Forum to accept that the Complainant's performance was as deficient as described by some, mostly management witnesses, prior to her pregnancy. Moving her to a favored shift and giving her full hours are both inconsistent with what the Respondent now says was essentially a negative evaluation of her capabilities. According to the Respondent, the Complainant was barely adequate and caused workplace problems. Even that marginal adequacy disappeared once the Respondent's agents knew of the Complainant's pregnancy. The Respondent's position is that her performance deteriorated even further and they let her go.

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* Throughout the proceeding and throughout the Findings of Fact, the words "layoff" and "termination" were used, somewhat interchangeably, to describe the events in late February 1987 which resulted in the Complainant leaving the employ of the Respondent. Since the ultimate result was an involuntary severance of the Complainant's employment relationship with the Respondent, this Opinion will term it a "discharge."

But the evidence of deficient performance is suspect, as is that of the morning sickness. The Complainant and her spouse denied that she had any morning sickness. She admitted fatigue. She acknowledged two instances of illness in February 1987, which she attributed to a vitamin reaction and to the flu. Given the common knowledge of pregnancy symptoms and the fact that her pregnancy was known to all, it is not surprising that those who observed the admitted fatigue or the incidents of illness from causes other than pregnancy would nonetheless conclude that they were observing a common symptom of pregnancy. Given the work atmosphere where gossip and rumor abounded, it is also natural that even those persons who had no personal opportunity to observe the Complainant assumed that it was morning sickness, and also multiplied the frequency and severity of its onset.

The Respondent employed other overweight waitresses, according to the record, and there was testimony from one as to equal treatment. The Respondent employed other pregnant waitresses who apparently suffered no ill treatment due to pregnancy. The Complainant was discharged because of the view of the employer that she was big and due to pregnancy would get bigger, and could not be depended upon to perform her job. The employer believed that her weight made her slow and that her pregnancy would make her that much slower. In the judgment of the Respondent, the Complainant's weight impaired her performance. But it was the pregnancy, combined with this supposed impairment, which played a key role in her discharge. The Respondent was guilty of sex discrimination.

Damages

The record reflects that the Complainant was unemployed following her discharge until after the birth of her first child. She testified to a continuing job search both before and after the birth. The Forum found that she was working 36 hours per week at $3.35 per hour. There was evidence that she earned tips in addition, more on the day shift than other shifts. After finding a job in April 1988, which she voluntarily quit, she found work in about August 1988. All of the testimony given regarding earnings was uncontroverted. But no amendment was suggested to increase the lost income prayer. Accordingly, the Forum is awarding wage loss as follows:

$ 3.35 x 36 hours/week	$120.60
February 28 to September 19, 1987 = 28 weeks	$3,376.80
November 1987 to April 30, 1988 = 26 weeks	$3,135.60
	$6,512.40
less earnings at York Park	- $186.00
Allowable wage loss	$ 6,326.40

In computing the above, the Forum has allowed for an eight-week period for child-birth, as suggested by the Agency. The Forum has extended the job search period a few weeks, there being some inference that the Complainant kept looking after the York Park job. The Forum is unable to speculate beyond that, there being no point in computing above what was asked for.

Mental Suffering

The Complainant testified to upset, disruption of appetite, and a feeling of humiliation and shame. The suddenness with which she became unemployed was a shock. She cried at home and was later upset by this proceeding. The embarrassment or discomfort caused by the hearing itself is not compensable. The Forum must limit its award for mental distress to the direct result of the Respondent's unlawful practice. In this regard the Forum is awarding the sum of $3,000.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent is hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for TINA CARPENTER, in the amount of:

a) SIX THOUSAND THREE HUNDRED TWENTY SIX DOLLARS AND FORTY CENTS ($6,326.40), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) SIX HUNDRED THIRTY TWO DOLLARS AND SEVENTY SIX CENTS ($632.76), representing interest on the lost wages at the annual rate of nine percent accrued between October 19, 1987, and March 6, 1989, and between May 30, 1988, and March 6, 1989, on the respective portions thereof computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

d) THREE THOUSAND DOLLARS ($3,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

In the Matter of

COURTESY EXPRESS, INC.,

Respondent.

Case Number 36-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued November 1, 1989.

SYNOPSIS

Respondent discriminated against Complainant in compensation and in the terms, conditions, and privileges of

employment due to her sex, by paying her less than males exercising the same skill, effort, and responsibility, and by treating her differently than male employees (by undervaluing her services and abilities because of her sex), in violation of ORS 659.030(1)(b). The measure of damages was the difference between what Complainant was paid and what she should have been paid absent the discriminatory standard. The Commissioner awarded complainant the difference in pay and damages for mental suffering. ORS 659.030(1)(b); OAR 839-05-010.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on May 23, 1989, in Room 311 of the Portland State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy, and examined the witnesses. Courtesy Express, Inc., (hereinafter the Respondent), after being duly notified of the time and place of this hearing and of its obligation to file an answer within twenty (20) days of the issuance of the Specific Charges, failed to file an answer as required. The Hearings Referee found the Respondent in default. Teresa Krieske (hereinafter the Complainant) was present throughout the hearing. She was not represented by counsel. The Agency called as witnesses the following: the Complainant; Joseph Tam, Investigative Supervisor with the Agency; and David Wright, Senior Investigator with the Agency.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make following Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) On March 6, 1987, the Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that she was the victim of the unlawful employment practice of the Respondent.

2) After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint, and finding the Respondent in violation of ORS 659.030.

3) Joseph Tam, an investigative supervisor for the Agency, approved the Administrative Determination prepared by the investigator, David Wright, and subsequently initiated conciliation efforts between the Complainant and the Respondent on or about March 4, 1988. On September 19, 1988, he concluded that conciliation had failed and referred the case to the Agency's Quality Assurance Unit for further action. The Respondent's representative during investigation and conciliation was Larry Tonn.

4) On March 31, 1989, the Agency prepared and served on the Respondent Specific Charges herein, alleging that the Respondent had failed to pay the Complainant as much for her employment as a dispatcher as it paid to males who were so employed, based on her female sex, constituting discrimination based on sex in the terms and conditions of Complainant's employment in violation of ORS 659.030(1)(b).

5) With the Specific Charges, the Forum served on the Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) A copy of those Charges, together with items (a) through (d) of Procedural Finding 5 above, were sent by certified mail, postage prepaid, to the last known address (supplied by the Agency) of the following pursuant to OAR 839-30-030(1):

> Larry Tonn, Courtesy Express, Inc., 521 N. Tillamook, Portland, Oregon 97227
>
> Don V. Wallace, Registered Agent, Courtesy Express, Inc., 4829 N.E. 42nd Avenue, Portland, Oregon 97230

7) Both the Notice of Contested Case Rights and Procedures (item (b) in Finding 5) and the Bureau of Labor and Industries contested case hearings rules (item (d) in Finding 5), at OAR 839-30-060(1), provide that an answer must be filed within 20 days of the issuance of the charging document.

8) A U.S. Post Office Domestic Return Receipt, Certified Mail, was received by the Hearings Unit showing delivery to the following addressee on the date indicated per the signature listed

> "Don V. Wallace, Registered Agent, Courtesy Express, Inc., April 3, 1989 -- Apryll Hoffare"

9) On April 4, 1989, the certified mailing of the copies of the documents described in Finding 5 addressed to Larry Tonn at 521 N. Tillamook, Portland, Oregon 97227, was returned to the Hearings Unit by the U.S. Postal Service marked

> "TON 21 45015411 FWD TIME EXPD
> TONN 2828 NW NELA
> PORTLAND OR 97210-1716
> RETURN TO SENDER"

The Agency was notified of the non-delivery.

10) On April 13, 1989, a copy of the Specific Charges, together with items (a) through (d) of Finding 5 above, were sent by certified mail, postage prepaid, to the last known address (supplied by the Agency) of the following pursuant to OAR 839-30-030(1):

> Larry Tonn, Courtesy Express, Inc., 2828 N.W. Nela, Portland, Oregon 97210

11) On April 24, 1989, the Forum sent a letter entitled "Notice of Intent to Default" by first-class mail with postage prepaid to the following:

Larry Tonn, Courtesy Express, Inc., 2828 N.W. Nela, Portland, Oregon 97210

Don V. Wallace, Registered Agent, Courtesy Express, Inc., 4829 N.E. 42nd Avenue, Portland, Oregon 97230

The purpose of the letter was to assure that no late-delivered, but otherwise timely, answer to the Specific Charges existed.

12) On May 1, 1989, the mailing to Larry Tonn described in Finding 11 was returned to the Hearings Unit, marked

"COU 28 14272921 FWD TIME EXPD
COURTESY EXPRESS
PO BOX 3814
PORTLAND OR 97208-3814
RETURN TO SENDER"

13) On May 2, 1989, the Forum sent the letter entitled "Notice of Intent to Default" by first-class mail with postage prepaid to the following:

Larry Tonn, Courtesy Express, Inc., P.O. Box 3814, Portland, Oregon 97208-3814

14) The mailing described in Finding 13 was not returned.

15) Pursuant to OAR 839-30-071, on May 16, 1989, the Agency timely filed a Summary of the Case.

16) No representative of the Respondent attended the hearing of May 23, 1989.

17) Pursuant to ORS 183.415(7), the Agency and the Complainant were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) On May 25, 1989, the Forum issued a Notice of Default under OAR 839-30-185. This notice was sent by first-class mail with postage prepaid to

Larry Tonn, Courtesy Express, Inc., P.O. Box 3814, Portland, Oregon 97208-3814

Don V. Wallace, Registered Agent, Courtesy Express, Inc., 4829 N.E. 42nd Avenue, Portland, Oregon 97230

It recited that pursuant to OAR 839-30-190, a party found in default had 10 days from the notice to request relief from default.

19) The Proposed Order in this contested case was issued on September 19, 1989, and included an Exceptions Notice. For exceptions to be accepted by the Bureau, they were to be postmarked and/or received by September 29, 1989, or sooner. The Hearings Unit did not receive any exceptions with regard to this case.

FINDINGS OF FACT – THE MERITS

1) Respondent Courtesy Express, Inc., is an Oregon corporation engaged in the trucking business and utilizing the personal service of one or more employees and controlling the means by which such service was performed at all times material herein.

2) The Complainant Teresa Krieske is a female with prior courier experience who was hired by Respondent as a driver on May 14, 1986. She initially spoke to Roger Carnaghi, and then Brent Eggleston. Her rate of pay was $4.00 per hour, and her duties were to pick up and deliver packages in the Portland area. She worked an average of 9 to 9½ hours per day.

3) After about three weeks, she was asked by Carnaghi and Eggleston if she would accept a promotion to dispatcher. She was qualified by her prior experience and her major in computers in college.

4) She accepted the dispatcher position at the offered rate of $4.75 per hour. Carnaghi, the former dispatcher, became assistant manager.

5) About 1½ weeks later, she learned that Carnaghi had been paid more as a dispatcher than she was getting. He had been paid a salary of $250 per week. He did not work overtime.

6) When the Complainant performed the dispatcher duties, she worked over eight hours each day. She opened and closed the dispatch office, and averaged 11 to 12 hours a day, for which she was paid straight time.

7) The Complainant's duties included accepting customer calls, setting up driver routes and dispatching drivers, inventorying and organizing freight, taking care of payroll hours and petty cash, and keeping the office organized and running properly. About four months before she left, she gained duties in public relations, sales, and the performance of mechanical work on the vehicles.

8) The Complainant never received a raise in pay for the increased duties. She asked several times and was told that when the company started making more money, she would be paid more. There were continuous promises, but it never happened.

9) While the Complainant was a driver, she observed Carnaghi's duties as dispatcher. He accepted customer calls, dispatched drivers and set the routes, organized the freight, and did the payroll hours and petty cash. He did no public relations or sales as dispatcher. He did some mechanical work.

10) The Complainant performed dispatcher duties from early June to December 17, 1986.

11) Russell Hailey, a driver, was also earning $4.75 per hour. He succeeded the Complainant after December 17 as dispatcher, where he was paid $250 per week on salary, and was not allowed to work overtime. His only experience was as a driver. Kim Kistler, female, a part-time driver who had eventually become the Complainant's assistant dispatcher, was not considered.

12) During her employment with Respondent, the Complainant was told by management what hours to work, when to take breaks, and what company equipment to use. She was required to follow company policy and procedures in accomplishing her work and could not hire help for herself.

13) While the Complainant was dispatcher, Respondent hired Jim Britain to drive a semi-truck. He resented taking orders from a female dispatcher, and questioned her authority. She reported this to Eggleston, who fired him, and Lawrence Tonn, Respondent's president, re-hired him the following day.

14) The re-hire of Britain caused Eggleston to quit. Carnaghi took over his manager duties. This was when

the Complainant's duties increased in order to absorb Carnaghi's former job.

15) Tonn rejected suggestions from the Complainant and was more accepting of conversations with males. He questioned that she could accomplish mechanical repairs on the trucks where male mechanics had not. He commented to her while she was working on a truck that he couldn't believe that she could get down and get dirty and actually fix the vehicle, that a woman had never been able to do that.

16) The Complainant perceived that she was "talked down to" by Tonn, and that to him she was not as good as somebody else (male) that was doing the same job.

17) The only other females employed by Respondent were a bookkeeper and, after the Complainant became dispatcher, Kim Kistler.

18) The re-hire of Britain undermined the Complainant's work relationship with other drivers. He had been told by Tonn that he needn't pay attention to the Complainant.

19) The increase in duties at work and the lack of a commensurate increase in pay caused the Complainant friction at home, where she and her husband argued about the inadequate compensation. It was very stressful for her.

20) It was hard emotionally for the Complainant to go to work and feel confident in the work she was doing when she was getting the negative response of not being good enough and not being capable.

21) The Complainant felt embarrassed and degraded, and that the drivers downgraded her due to the disparity in pay and the eroding of her position by Tonn. She sometimes cried when alone.

22) The Complainant asked continuously for a pay increase, and was always told she would get more when the company made more. Times were set for a possible increase, but the date would come and go without action. Some drivers received an increase while she was a dispatcher, but she did not.

23) It was hard emotionally for the Complainant to know that she did not have the respect of the drivers. She believed that this disrespect stemmed from the attitude of Tonn as to the value of her services.

24) The pay which the Complainant did receive was usually in the form of a payroll check, although Tonn at times paid in cash or by personal check. In each instance, taxes and other deductions were withheld.

25) Lawrence Tonn, Respondent's president, actively operated the Respondent's operation, dealt with the Agency during the investigation, and made all final hiring, firing, promotion, and pay decisions.

26) Tonn initially told the Agency investigator that the Complainant was an independent contractor, but later admitted that she was Respondent's employee.

27) Tonn told the investigator that both Carnaghi and Hailey were paid more than the Complainant in the position of dispatcher.

28) When interviewed by the investigator, Carnaghi, Hailey, and the Complainant agreed that the basic duties of the position of dispatcher at Respondent's establishment were the same when each of them occupied the position.

29) Tonn discharged the Complainant effective December 17, 1986. He stated that he was dissatisfied with her job performance. Carnaghi stated that she did a good job as dispatcher. Another driver stated that she sometimes was angry with drivers who asked questions. She had received no reprimands previously.

30) Hailey, the Complainant's male replacement, asked to be relieved of the dispatcher position. He was replaced as dispatcher by another male, who was terminated as dispatcher and replaced by a female dispatcher.

31) The differential between the Complainant's rate of pay as dispatcher and the $250 per week paid to Carnaghi and Hailey for the same job was $1.50 per hour, or $60 per week. For the period June 30 through December 17, 1986, while the Complainant was Respondent's dispatcher, the total difference is $1,404.75 for hours worked.

ULTIMATE FINDINGS OF FACT

1) Respondent Courtesy Express, Inc. is an Oregon corporation utilizing the personal service of one or more employees and controlling the means by which such service was performed at all times material herein.

2) The Complainant Teresa Krieske is a female who was hired by Respondent as a driver on May 14, 1986 at $4.00 per hour. She was promoted to dispatcher, for which she was qualified, in June at the rate of $4.75 per hour.

4) The basic duties of the position of dispatcher at Respondent's establishment were the same for the Complainant as they were for her male predecessor in the position and for her male successor in the position, requiring the exercise of at least the same level of skill, effort, and responsibility.

5) The Complainant's male predecessor was paid a salary of $250 per week. Her male successor was paid a salary of $250 per week. Neither worked overtime, although she was required to do so.

6) Lawrence Tonn, Respondent's president, actively operated the Respondent's business as if it were a sole proprietorship.

7) Tonn treated the Complainant differently from male employees. She suffered emotional discomfort and distress as a result of disparate pay and other different treatment based on her female sex.

8) The Complainant employment with Respondent terminated effective December 17, 1986.

9) The pay differential between the established value of the dispatcher position and the rate Complainant was paid as Respondent's dispatcher for the period June 30 through December 17, 1986, is $1,404.75 for hours worked.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in pertinent part:

> "* * *
>
> "(6) 'Employer' means any person * * * who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the

right to control the means by which such service is or will be performed.

"* * *

"(11) 'Person' includes one or more individuals [or] * * * corporations * * *

"(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

At all times material herein the Respondent Courtesy Express, Inc. was an employer subject to the pertinent provisions of ORS 659.010 to 659.435.

2) ORS 659.040 provides, in pertinent part:

"(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the employer alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof. * * *"

OAR 839-07-515 provides

"A person who claims to be aggrieved under laws prohibiting discrimination because of sex may file a complaint with the [Civil Rights] Division. (*See* OAR 839-03-025 and ORS 659.040.)"

ORS 659.050 provides, in pertinent part:

"(1) After the filing of any complaint under ORS 659.040 * * *, the commissioner shall cause prompt investigation to be made in connection therewith. * * * If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110. * * *"

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found.

3) ORS 659.030 provides, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110, it is an unlawful employment practice:

"* * *

"(b) For an employer, because of an individual's sex, to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

The conduct of Respondent Courtesy Express, Inc. in paying the Complainant, a female, less than males exercising the same skill, effort, and responsibility was a violation of ORS 659.030(1)(b), and the conduct of said Respondent in treating said Complainant differently from males in the terms, conditions, and privileges of employment was a violation of ORS 659.030 (1)(b).

4) The actions, inactions, statements, and motivations of Lawrence Tonn are properly imputed to the Respondent herein.

5) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

The named Respondent Courtesy Express, Inc. was found in default, pursuant to OAR 839-30-185(1)(a), for failure to file an answer to the Specific Charges. In addition, no representative of Respondent attended the scheduled hearing, and thus Respondent also defaulted pursuant to OAR 839-30-185(1)(b).

In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6), OAR 839-30-185(2).

To present a prima facie case in this matter, the Agency must prove the following four elements

(1) The Respondent is a Respondent as defined by statute.

(2) The Complainant is a member of a protected class.

(3) The Complainant was harmed by an action of the Respondent.

(4) The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein.

(1) The evidence established that the Complainant was employed by a corporation, Courtesy Express, Inc. That entity reserved to itself the control of her work efforts, and that of her fellow workers, and the means by which their personal services on behalf of the corporation were to be performed. It hired, fired, set pay rates, paid, assigned and directed work, controlled hours of work and rest, set policies, procedures, and standards for accomplishing work, and in all respects operated as an employer. It was the entity against which the Complainant's administrative complaint was filed and against which the Agency filed its Specific Charges.

(2) The Complainant is a female and is protected under the employment discrimination statutes on the basis of her sex.

(3) The evidence clearly establishes that the Complainant was paid less while she was Respondent's dispatcher than others who occupied that position both before and after she did. The evidence established that she was treated adversely in other respects.

(4) The evidence also established that the duties of the job required the same skill, effort, and responsibility for all of the incumbents, and that the only difference among these incumbents was that the other two dispatchers compared were male. The evidence also shows that the other adverse treatment was due to her sex.

ORS 659.030(1)(b) makes discrimination in compensation on the basis of sex unlawful. In order to show such discrimination, it is not necessary to have two persons, one male and one female, doing the same job at the same time with one being paid less than the other. Where, as here, an employer employs individuals in serial or successor employment but pays different wages based on gender, this Forum has concluded that the subject statute is violated. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion, West Coast Truck Lines, Inc. v. Bureau of Labor & Industries*, 63 Or App 383, 665 P2d 882 (1983); *In the Matter of C & V, Inc.*, 3 BOLI 152 (1982).

It has also been established that where the duties of a position require the exercise of the same skill, effort, and responsibility, and the only distinction between current or past incumbents is the sex of the incumbents, there is a disparity in pay attributable to sex, and the measure of the damage is the difference between what the offended claimant was paid and what she should have been paid absent the discriminatory standard. *In the Matter of City of Portland*, 2 BOLI 110 (1981), *aff'd, City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984).

In a proper case, with proof of emotional distress, an unlawful disparity in pay based on sex will support an award for mental suffering (*City of Portland, supra.*), as will other adverse on-the-job treatment based on sex. In this instance, the evidence is that the Complainant asked several times for more pay, there were continuous promises, but it never happened. Her suggestions were rejected, her mechanical ability was questioned, and she was "talked down to." She was told that she was not as good as a male doing the same job, all because she was a woman. The disparity in pay caused friction and argument at home. She felt embarrassed, degraded, and that she was downgraded by the drivers due to the disparity in pay and the eroding of her position. It was hard emotionally to go to work knowing she did not have the respect of the drivers, and that their disrespect stemmed from the employer's attitude as to the value of her services. It was all very stressful. She couldn't feel confident in her work because of the negative response of not being good enough and not being capable. She sometimes cried when alone. All of this continued while the different treatment, including the unlawfully inadequate pay, continued.

Awards for mental suffering depend on the facts presented by each Complainant. Respondents must take complainants as they find them. Here, the Forum found that Complainant experienced mental suffering due to the deliberate undervaluation of her services and abilities, as described in Findings of Fact numbers 19 to 23. She suffered mentally and emotionally from that conduct, for which Respondent is directly liable.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent is hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Teresa Krieske, in the amount of:

a) One Thousand Four Hundred Four Dollars and Seventy-five cents ($1,404.75), representing wages Complainant lost as a result of Respondent's unlawful practice found herein;

b) Three Hundred Eighteen Dollars and Fifty-nine cents ($318.59), representing interest on the lost wages at the annual rate of nine percent accrued between January 17, 1987, and May 23, 1989, computed and compounded annually;

c) Interest on the foregoing, at the legal rate, accrued between May 23, 1989, and the date Respondent complies herewith, to be computed and compounded annually;

d) Two Thousand Dollars ($2,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein;

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

3) Cease and desist from discriminating against any current or future employee because of the employee's sex.

In the Matter of

Sam Arrietta and Mary Arrietta, dba

CASA TOLTEC,

Respondents.

Case Number 28-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued December 12, 1989.

SYNOPSIS

The Commissioner held that, since Complainant was infected with HIV (the AIDS virus), she was, as a matter of law, a disabled person. Respondents discharged Complainant because she was so infected and was a disabled person, in violation of ORS 659.425(1)(a). Respondents' asserted nondiscriminatory reason for the discharge (poor performance) was pretextual. Complainant did not seek further employment following the discharge, before her doctor determined that she was no longer employable. The Commissioner did not award back wages, but awarded damages for mental suffering. ORS 659.400, 659.425(1)(a); OAR 839-06-205.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 26 and 27, 1989, in Room 223, Apprentice Building, Lane Community College, 4000 East 30th Avenue, Eugene, Oregon. Linda Lohr, Case Presenter with the Quality

Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Sam Arrietta and Mary Arrietta, dba Casa Toltec (hereinafter Respondents; Mary Arrietta did not attend the hearing or testify; reference to "Respondent" in the singular is to Sam Arrietta), were represented by Sean Donahue, Attorney at Law, Portland, Oregon. Counsel for Respondents presented a Summary of the Case, argued the law and facts, interposed objections and motions, examined the witnesses, and introduced documents. Debbie Carper, now known as Debbie Jensen (hereinafter the Complainant) was present throughout the hearing.

The Agency called as witnesses the following: the Complainant; Donna Broadsword, a Senior Investigator with the Agency; Roberta Colby, the Complainant's mother; Russ Colby, the Complainant's step-father; and Bonnie Dunten, former co-worker of the Complainant.

The Respondents called as witnesses Barry Tapp, Michael Johnson, Pamela McBride, Daniel Hardt, and Elmer Bartzat, Respondents' customers; Sylvia Mangeri, Respondents' manager; and Respondent Sam Arrietta.

The Hearings Referee called as the Forum's witness David Fleming, M.D., Deputy Epidemiologist for the State of Oregon Health Division.

Having fully considered the entire record in this matter I, Mary Wendy Roberts, hereby make the following Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On June 2, 1987, the Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practice of the Respondents based on her status as a handicapped person.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding the Respondents in violation of ORS 659.425.

3) The Agency subsequently initiated conciliation efforts between the Complainant and the Respondents. That conciliation failed and the case was referred to the Agency's Quality Assurance Unit for further action.

4) On February 1, 1989, the Agency prepared and served on the Respondents Specific Charges herein, alleging that the Respondents subjected the Complainant to discriminatory treatment based on her having an impairment, HIV infection, which impairment did not limit her major life activities, or only did so as the result of Respondents' attitude toward said infection, which treatment resulted in the unlawful termination of her employment with the Respondents in violation of ORS 659.425(1)(a) and (1)(c).

5) With the Specific Charges, the Forum served on the Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures

containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On February 9, 1989, the Forum received a telephone call from Vickie H. Yates, Attorney at Law, of attorneys for Respondents herein, regarding subpoena and discovery procedures. She was advised to follow OAR 839-30-000, *et seq.*, that the Hearings Referee did not have the Agency's investigative file under said rules, and to provide the Agency with copies of any filing or correspondence with the Forum in this matter.

7) On February 15, 1989, the Respondents, through counsel, filed the following:

a) Motion For Production of Documentary Evidence To Agency, citing OAR 839-30-070(5), requesting production of all documents relating to the specific charges.

b) Motion For Production of Documentary Evidence To Complainant, citing OAR 839-30-070(5), requesting production of:

1. written or other recorded material regarding public statements made by the Complainant since May 16, 1987;

2. documents identifying health professionals treating or consulted by Complainant since her first positive test for HIV virus;

3. documents identifying health facilities treating or consulted by Complainant since her first positive test for HIV virus;

4. documents identifying other professionals treating or consulted by Complainant since her first positive test for HIV virus;

5. all records including chart notes and reports of health professionals treating or consulted by Complainant for physical or psychological problems since her first positive test for HIV virus;

6. all documents relating to all lawsuits or other legal actions to which Complainant has been a party since 1985; and

7. documents relating to statements made by Respondents regarding the specific charges herein.

c) Motion For Postponement, with supporting affidavit of Sean Donahue, Attorney at Law, citing a pre-planned vacation as reason to re-set the hearing scheduled for March 28, 1989, herein.

All of said motions were served on the Agency, on Martha C. Evans, Attorney at Law, Eugene, as the Complainant's attorney, and addressed to the Complainant.

8) On February 16, 1989, the Hearings Referee ruled as follows on the Motions for Production and Motion For Postponement:

a) Motion For Production of Documentary Evidence To Agency: Noting that the Hearings Referee did not have pre-hearing access to the Agency investigative file and was thus unaware of its contents, the Referee directed that the Agency make available to Respondents' counsel within 10 calendar days any and all information in its possession to which "the ordinary rules of

discovery apply," *citing Ogden v. Bureau of Labor and Industries*, 68 Or App 235, 682 P2d 802 (1984); 299 Or 98, 699 P2d 189 (1985).

b) Motion For Production of Documentary Evidence To Complainant: Noting that the Complainant is not a party, but is a compellable witness, directed the Agency to produce any evidence requested in this motion over which it has power or authority, in the same manner and time frame as the motion to the Agency;

c) Motion For Postponement: Explaining that the personal plans of counsel did not qualify under the "good cause" standard of OAR 839-30-070 (7) as defined in OAR 839-30-025(11), particularly where associate counsel has appeared and is available, denied the motion for postponement.

9) On February 21, 1989, the Respondents, through counsel, filed their answer to the Specific Charges herein, and on March 6, 1989, the Respondents, through counsel, filed a Motion To Issue Subpoena and Order Taking of Deposition, supported by the affidavit of Counsel, and requesting that the Hearings Referee issue a subpoena duces tecum to the Complainant requiring her to appear for deposition on May 13, 1989, at the office of her attorney, and requesting an order to the Complainant to produce, at Respondent's counsel's office in Portland by May 9, 1989, certain documents and records relative to her physical and mental history and condition, to her employment with Respondents, and to related matters dealing with her claim of discrimination and damages. The affidavit averred that the Complainant had refused to allow her attorney to accept service or to reveal the Complainant's address, and had refused to sign a release of medical records.

10) On March 13, 1989, pursuant to the Hearings Referee's request of March 8, the Agency submitted to the Hearings Referee its response to Respondents' Motion to Issue Subpoena and Order Taking of Deposition, reciting the Agency's understanding of the Complainant's claim of a right to privacy and of the Complainant's assertion of lack of relevancy concerning some of Respondents' information requests, and offering to allow the Referee to inspect the records in camera. The Agency recognized the potential relevance to damages of some of the information sought.

11) On March 15, 1989, the Hearings Referee ruled on Respondents' motion, relying on counsel's supporting affidavit, the Agency's response to the motion, and pertinent portions of the Oregon Administrative Procedure Act, the Forum's Rules, the Attorney General Model Rules, the Oregon Rules of Civil Procedure, and the Oregon Rules of Evidence (regarding privilege). Commenting on the purpose of discovery, on the admissibility of evidence in an administrative contested case hearing, on the Respondents' entitlement to depose the Complainant, and on the fact that the Specific Charges placed in issue two claims on the Complainant's part which call for certain proof of a medical nature, the Referee made specific rulings, some of which were limiting or protective, on the ten items in the Respondents' list appended to its motion entitled "Documents Requested To Be Subpoenaed From Deborah A. Carper." The Forum issued its subpoena for deposition and production of documents, including as Exhibit A thereto a copy of the Forum's rulings on each of the 10 requested items, and directed it to the Complainant Debbie Carper in Florence, Oregon, through the Lane County Sheriff, Eugene, Oregon.

12) Pursuant to the ruling of March 15, the Forum issued its subpoena for deposition to be arranged no later than March 22, 1989, and commanded the Complainant to produce at that time the items listed in the Respondents' request as limited or modified by the ruling. The ruling also relaxed time lines for other pre-hearing submissions under the Forum's rules, and provided that the Agency would be precluded from offering evidence at hearing regarding any items the Complainant refused to provide.

13) On March 16, Respondents again filed a motion for postponement based on the impossibility of either participant being prepared under the time frames imposed by the Forum, and the Agency joined in the motion. On March 17, recognizing both the short time frame imposed by the prior ruling and the Respondents' counsel's timely efforts at discovery, which were delayed by the Complainant's unwillingness to make herself available for unlimited discovery, and assuming that the rulings of March 15 had been served, the Hearings Referee granted the motion for postponement, resetting the hearing to begin May 9, 10, or 11, subject to the availability of the participants. The Referee also reset the deposition and production of documents to be arranged no later than April 10, 1989.

14) On March 29, 1989, the Lane County Sheriff verified that service of the subpoena for deposition by March 20 was not successful, and on March 31 the Forum issued an amended hearing notice setting the hearing in this matter for May 10, 1989.

15) Pursuant to OAR 839-30-071, on April 28, 1989, the Respondents timely filed a Summary of the Case; on May 1, 1989, the Agency timely filed a Summary of the Case.

16) On May 3, 1989, after reviewing the Case Summaries, the Hearings Referee advised the participants that Laurence Foster, M.D., State of Oregon Epidemiologist, would appear at the hearing as the Forum's witness on the subject of HIV infection in general, and that both the Agency Case Presenter and Respondents' counsel could question Dr. Foster following questioning by the Referee.

17) On May 8, 1989, pursuant to motion by Respondents' counsel not opposed by the Agency and based in part upon the affidavit of one of counsel to the effect that untimely releases from the patient had delayed the submission of medical records under subpoena, the Hearings Referee again postponed the hearing to June 13, 1989, and ruled that in the event of any further application for postponement, the participants should be prepared to appear before the Referee for a presentation on the record of responsibility and reasons for further delay.

18) On May 23, 1989, the Respondents again moved for postponement, and the Hearings Referee set a hearing thereon for May 25, 1989. On May 25, 1989, the Referee heard the statements and arguments of counsel for

the Respondents in favor of the motion, and the statements and arguments of the Agency, which opposed further delay. At the end of the presentation of May 25, the Referee orally granted the motion, based primarily on the assignment of lead counsel in federal court in Chicago and the unavailability of associate counsel on June 13, and reset the hearing to July 26, 1989.

19) During the hearing of May 25, 1989, upon the urging of the Hearings Referee, the participants agreed on the record to certain factual stipulations:

a) At times material, the Complainant was HIV infected, as alleged.

b) The Complainant was employed at Casa Toltec between April 20 and May 19, 1987; she was paid at the rate of $ 3.35 per hour for hours worked.

c) The Respondents Sam Arrietta and Mary Arrietta, doing business as Casa Toltec, utilized the personal services in Oregon of six or more employees, including the Complainant, during said period.

d) The Complainant's said employment terminated on or about May 19, 1987.

e) The Complainant filed a verified complaint in writing with the Agency on June 2, 1987, alleging that the Respondents had committed an unlawful employment practice based on her status as a handicapped person .

f) Following investigation and review, the Agency issued an administrative determination finding substantial evidence to support the allegations of said complaint.

g) The Agency attempted by conference, conciliation, and persuasion to resolve the complaint, but was unsuccessful, and the Specific Charges herein were issued on February 1, 1989.

These stipulations are used appropriately in the Findings of Fact herein.

20) At the commencement of the hearing, the participants agreed to further factual stipulations:

h) The Complainant appeared on a television newscast in Eugene on May 18, 1989, in which she asserted that she was HIV infected.

i) Medical information submitted by the participants herein will be admitted without objection as to its hearsay nature.

These stipulations were stated into the record by the Hearings Referee and are used appropriately in the Findings of Fact herein.

21) At the commencement of the hearing, counsel for the Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

22) Pursuant to ORS 183.415(7), the Respondents and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

23) During the hearing, at the close of the Agency's case in chief, the Agency:

a) moved that the Respondents produce for the Forum the original time records or legible copies of the original time records from which the Time Sheet Summary was made. The motion was allowed, subject to the current availability of those records.

b) moved that the Respondents produce for the Forum the original of the personnel record or, if the original is unavailable, a clearer copy of the document. The motion was allowed subject to the current availability of that record.

c) assured the Forum that it would submit, and serve on Respondents' counsel, legible copies of the interview of Gary Grove by Investigator Broadsword, which the Hearings Referee had previously ruled admissible over Respondents' objection.

d) moved to correct a citing error in the Specific Charges, asking that the language be changed from "ORS 659.425(1)(a)" to "ORS 659.425(1)(c)". The amendment was allowed.

24) At the close of the hearing, the Hearings Referee designated 5 p.m., Thursday, August 10 as the time by which the various submissions described in Procedural Finding of Fact 23 was to be received by the Forum, at which time the record herein would close, and added the following modifications to the rulings therein:

b) provided that if the original of the personnel record was unavailable, the clearest copy available be accompanied by counsel's affidavit regarding the unavailability of the original;

d) provided that the amendment be made and initialed by the Hearings Referee by interlineation on the original Specific Charges.

25) The original personnel record, and the available original time sheets except the week of April 20 to 27, 1987, were received timely. A copy of the Gary Grove interview was received late due to illness of Agency staff, which the Hearings Referee finds was good cause.

26) The Proposed Order which included an Exceptions Notice, was issued on November 2, 1989. Exceptions were required to be filed by November 13, 1989. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) The Respondents Sam and Mary Arrietta, under the assumed business name of Casa Toltec, operated a restaurant in Eugene, Oregon, utilizing the personal service of six or more employees and controlling the means by which such service was performed at times material herein.

2) The Complainant Debbie Carper, now known as Debbie Jensen, worked at Casa Toltec as a waitress from April 20, 1987, to May 19, 1987, at a wage of $3.35 per hour for hours worked.

3) The Complainant was HIV infected at times material herein, and had been advised by her personal physician that she had "ARC."

4) Dr. David Fleming received his Doctor of Medicine degree from Syracuse University, served a residency in internal medicine at Oregon Health Sciences University, and spent three years at the Center for Disease Control in Atlanta, Georgia. He is Deputy Epidemiologist for the State of Oregon, works in the Oregon Health Division Communicable Disease section, and has overall management of the Oregon Health Division HIV program.

5) "HIV infection" is a medical term currently used to describe an infectious, chronic blood-borne infection that progresses to the disease commonly

referred to as "AIDS". "HIV infection" has also been known as "HTLV III" or "LAV" infection. The retrovirus causing the disease is commonly referred to as the "AIDS virus."

6) "AIDS" is an acronym for "Acquired Immune Deficiency Syndrome," the final and generally fatal stage of HIV infection. "ARC" is an acronym for "Aids Related Complex," a term originally used in the medical profession to describe the symptomatic stage of HIV infection, which may follow a usually long dormant period after initial infection.

7) AIDS was first recognized in the late 1970's and early 1980's; the virus causing it was discovered in 1983-84.

8) Initial infection with HIV may be characterized by flu-like symptoms and/or a rash, or there may be no overt symptoms. Following initial infection, there may be a dormant period of from 5 to 10 years before chronic or recurring symptoms such as swollen lymph nodes, fever, diarrhea, weight loss, fatigue, and general malaise appear.

9) AIDS, the terminal stage of HIV infection, is diagnosed clinically on the basis of the patient having conditions, infections, or cancers that show that the patient's immune system is functioning improperly.

10) Antibodies are substances produced by the human immune system to fight off infection. HIV infection creates HIV antibodies, the presence of which may be detected in a blood test for that purpose. This test may be negative for from 3 to 6 months after infection, but once positive, it remains so for life. Blood tests for the virus itself are less sensitive, and show positive only when the virus is more prevalent, as when symptoms appear.

11) HIV is spread through introduction of infected blood, or infected blood products such as semen or vaginal secretions, into the bloodstream of a non-infected person. Fluids or secretions such as saliva, nasal mucous, feces, or urine generally do not contain a sufficient concentration of the virus to be infectious.

12) The most common means of introduction of the infection is through unprotected sexual intercourse, either heterosexual or homosexual, with an infected person. The next most common means of infection is direct blood to blood. This includes the sharing of intravenous drug needles, receiving a transfusion of infected blood, and infected mother to fetus transmission.

13) Since discovery of the virus, the Oregon Health Division has on individual levels and through seminars and state wide presentations disseminated information regarding the manner and means of transmission, and regarding the risks to the general population. Persons who do not engage in unprotected sex, who are not intravenous drug users, and who do not receive transfusions are not at risk.

14) The HIV virus does not readily survive outside the body and blood environment; unlike hepatitis A, for example, it does not survive on counters, food, or utensils.

15) There is no documented instance of HIV infection being transmitted casually, that is, other than by body secretion to blood or blood to blood transmittal. It is not reasonably medically probable that the virus can be spread by a handshake or in ordinary office or workplace contact.

16) The term "Persons With Aids" (PWA) may be used by some to include all persons who are HIV infected, whether or not symptomatic.

17) As with any chronic disease, work may be a form of therapy for PWA's, which avoids or lessens the depression resulting from the patient's awareness of the disease. Such depression may itself adversely affect the patient's health.

18) The symptomatic stage that occurs after the long dormant period can be cyclical, that is, there can be windows of remission where no symptoms occur. As far as employability is concerned, it is usually the patient's decision as to what the patient can or cannot do.

19) SHANTI in Oregon is a support organization for family, friends, and loved ones of PWA's.

20) The Complainant worked varying shifts. Usually, there was a cook and a dishwasher and, sometimes, a second server on the premises.

21) Respondent Mary Arrietta did some of the cooking. She was hard to get along with, and yelled at the waitresses.

22) Substitutions on menu items were not allowed; it was necessary for the waitress to so inform the customer. Some customers became upset over the no substitution policy, especially where the customer request was to delete an ingredient. When a substitution was requested by a customer, the waitress was to contact either Respondent or Respondents' manager, Sylvia Mangeri, if either was available.

23) Mangeri had no recollection of customers complaining about the no substitution policy.

24) The Respondents and their manager were tough, intimidating, and strict people to work for.

25) As a waitress at Casa Toltec, the Complainant was expected to serve customers, handle the till, clean, mop, keep the restrooms clean, do sidework, stock, and be on call when needed.

26) The Respondents have employed persons with impairments, which they have accommodated. Their policy is to accept such persons for employment.

27) Sylvia Mangeri, Respondents' manager, interviewed the Complainant for hire. She made notes of the interview across the top of the application, which bears a date of April 17, 1987.

28) Mangeri asked the Complainant if she had any health problems that would limit her employment at Casa Toltec; specifically, she asked about lifting limitations. The Complainant stated she had no such problems.

29) Mangeri hired the Complainant for a permanent, full-time position, which she described as 3 to 35 hours per week. The Complainant wanted full-time work, but believed she was hired initially as part-time help and that she would eventually work weekends. The application is noted "Full Time – permant [sic] 35-38 hour @ wk".

30) When interviewing, Mangeri stressed the necessity for waitresses to work weekends. She did so because some applicants want weekends off, and it is the restaurant's busy time. She did so when interviewing the

Complainant. She could make arrangements for a weekend off if she has a waitress on call to fill in.

31) Mangeri discussed restaurant policies with the Complainant at the interview, and marked a document headed "Restaurant Policies" as follows: "Debbie Carper Hired April 14 1987". Apparently at another time she also marked a similar but not identical document headed "Restaurant Policies" as follows: "Hired 4-17-87 SM". She could not recall why there were two such documents, why the dates differed, or whether anyone else was hired on either date.

32) The Complainant did not tell Mangeri that she had ARC or the HIV infection at the time of hire. She did not tell Mangeri that she suffered from depression or that she was taking antidepressant medication.

33) The Complainant told Mangeri that her husband was terminally ill and that she needed to go to two weekend counseling sessions. Mangeri said it could be arranged depending on the help situation at the restaurant.

34) Respondent is a recovering alcoholic who attempts to assist others recovering from alcoholism and other substance abuse problems. He overheard part of the Complainant's interview with Mangeri about the Complainant's husband being terminally ill, and told Mangeri to give her a chance.

35) Casa Toltec was open 11:30 a.m. to 9:30 p.m. Monday through Thursday, 11:30 a.m. to 10 p.m. Friday and Saturday, and 4 p.m. to 9:30 p.m. on Sunday at times material herein.

36) A written response to the Agency from Respondent states that the Complainant's work schedule was 11:30 a.m. to 8:30 p.m., Wednesday through Saturday, and 4 p.m. to 8 p.m., Sunday.

37) Waitresses were sometimes sent home when business was light, or when the restaurant occasionally closed early.

38) The Complainant never complained to Mangeri about being tired, or asked to leave early due to fatigue.

39) Originally, the Complainant asked for two weekends off for SHANTI training: May 8, 9, and 10, and May 15, 16, and 17. This time off was allowed; however, she worked May 15.

40) The Complainant worked April 21 through 23, April 27 through May 3, May 6 and 7, and May 13 through 15, a total of 15 work days.

41) A week or so after the Complainant was hired Respondent learned from Mangeri that she was in alcohol and drug recovery.

42) The restaurant was not open May 10.

43) The Complainant was not asked to make up the time she missed by attending the SHANTI training. She would have worked if work was offered.

44) A comparison among the Complainant's work schedule submitted to the Agency, the Complainant's time sheets and summary thereof, and the hours of the restaurant's operation fails to assist in identifying any instances when the Complainant may have left early, either due to slow business or for any other reason. On 10 of the 15 days worked, she left after eight or more hours or at or after closing.

45) When hired, a new waitress got a copy of the menu, sample order tickets correctly filled out, and a list of standard abbreviations which were to be used. There was also a menu in the kitchen, and an adding machine was available. It was intended that each employee learn the abbreviations and pricing so that each order could be accurately read by the cook and the order properly filled, and the customer could tell for what he or she was charged.

46) Mangeri instructed the Complainant on prices, on how to write items and abbreviations, and on voiding tickets. Tickets which were messy or unreadable or had incorrect pricing or abbreviations were not acceptable. The Complainant had several of these.

47) The tickets were consecutively numbered in pads or books, and a record was kept of the starting and ending ticket for each server each shift. Each waitress had an identifying number, and a ticket could be voided only by Mangeri or Respondent. The Respondents considered the consecutive tickets important in accounting for meals and customers. If the till did not balance against the tickets, it could appear that either there was no payment or that an employee kept the payment.

48) When the cook misread or miscooked an order, the cook was obligated to correct the mistake. The waitress was obligated to correct the ticket, neatly. Scribbling on tickets was grounds for termination.

49) The Complainant made mistakes on tickets and Mangeri spoke with her about them. She was not spoken to about customer complaints or about undone back-up work. "I wasn't perfect, [but] they didn't complain."

50) Bonnie Dunten was also hired at Casa Toltec in April 1987 part time, 15 to 20 hours per week plus on call. Her scheduling was erratic and she was sent home early when business was slow. May 16 and 17 was her last weekend. She had given Mangeri notice prior to May 15 that she was quitting to take another job. She returned temporarily to Casa Toltec in September 1987 while Mangeri took vacation.

51) Dunten worked with the Complainant several times. She never observed the Complainant being rude to customers. She and the Complainant discussed personal matters, and she was aware that the Complainant's husband was ill and that the Complainant had requested some weekend time off for counseling sessions. Dunten was initially scheduled to cover the Complainant's anticipated weekend absences.

52) The Complainant appeared to Dunten to be able to handle the job physically. She never complained to Dunten of fatigue or of not feeling well. When they worked together, they waited on each other's customers for such things as additional water.

53) Dunten had been scheduled to work May 15, 16, and 17 (Friday, Saturday, and Sunday). Mangeri called her on May 15 to say she wasn't needed. The next day Dunten noticed that the Complainant had worked on the 15th. She asked Mangeri about it. Mangeri told her that the Complainant had decided to be there and that

Mangeri didn't need her so she sent her home early.

54) The pricing policies and the manner of filling out the order tickets were hard to remember. Dunten never really knew the process for filling out the tickets. The "no substitution" policy upset some customers, but because of time constraints, most customers accepted mistaken orders.

55) Barry Tapp was a customer for lunch at Casa Toltec sometime in May 1987, and was waited on by the Complainant. He had been a customer since 1972. He asked about a substitution and the waitress got "huffy." He considered her rude when he asked for more water and she didn't even check on the substitution. Tapp later saw the Complainant's picture in the paper regarding her complaint about her discharge and thought she looked familiar. He read the article in the paper and "went over there" (to Casa Toltec) because they were "very nice people" "in a can of worms."

56) Michael Johnson accompanied Tapp when the latter was served by the Complainant. He described the service as bad and her attitude as abrupt and abusive. It was not the quality of service he was used to. She was rude in taking the order and when they asked for water. The next time he was in, he understood she had been fired.

57) Pamela McBride saw a story in the paper about the restaurant, and Respondent later asked her to write to the Agency about what she observed. McBride's letter is dated March 21, 1988.

58) Dr. Daniel Hardt ate at Casa Toltec, accompanied by his wife and her uncle. All ordered a meal from an "unusually abrupt" waitress, and all three meals came out wrong. He considered the waitress "gruff" when she was asked to replace the mistakes; only two of the three were replaced. He thought it was unusual service. He then saw the Complainant's picture in the paper in connection with her complaint of discharge and he wrote a letter to Respondent.

59) Elmer Bartzat was more than a regular customer at Casa Toltec: he was a 20 year acquaintance and friend of Respondent. He was not charged for meals or drinks when he ate there. He usually tipped by giving a sum to the proprietor to be split among the help. He did this before the meal was over.

60) In May 1987 Bartzat and a companion ate at the restaurant and were served by the Complainant. He visited with Respondent and, before the meal was over, gave him $5.00 to split between two waitresses. This appeared to upset the Complainant, who left work.

61) The Complainant recalled that Mr. Bartzat had been drinking and was, in her words, "obnoxious." She knew he was Respondent's friend and was careful for that reason and was not rude. She confirmed the tip incident. She was angry because she had been scheduled to leave earlier and "the schedule didn't matter" when the employer wanted to change it.

62) Dunten was the other waitress on duty at the time. The customer was primarily the Complainant's. Although the Complainant's departure upset her, Dunten gave the Complainant her own half of the $5.00. So far as Dunten knew, the Complainant was not reprimanded. Mangeri told Dunten it was "no big deal."

63) Mangeri was not at work on the day of the Bartzat tip incident.

64) Other than a reference to this instance when the Complainant left in anger, there are no notations in the Complainant's personnel file regarding specific or general instances of complaints of rudeness or poor service.

65) The Complainant had permission to be off the weekend of May 16-17, and was scheduled to leave on the 15th at 5 p.m. She left at 4 p.m. with Mangeri's knowledge and permission.

66) Mangeri told Respondent that she had approved the Complainant being off on May 16 and 17, and had allowed her to leave at 4 p.m.

67) When the Complainant left at or near 4 p.m. on May 15, both Mangeri and Respondent wished her a pleasant weekend and voiced an expectation of seeing her Tuesday.

68) The final decision to discharge the Complainant was made by Respondent.

69) The Complainant appeared on a television newscast in Eugene on May 18, 1989, in which she asserted that she was HIV infected.

70) The Complainant went on the broadcast as part of a SHANTI effort to educate the public about AIDS and HIV infection. She did not discuss it with her employer beforehand, as she had a right to work and to do what's needed in her off time. She didn't mention where she worked: "I wouldn't have done that to them."

71) Dunten saw the Complainant's television appearance of May 18. The Respondents' restaurant was not mentioned. She also saw Mangeri and Respondent interviewed later in the week, at which time they stated that the Complainant was not a good employee and had not shown up for work. Dunten knew at the time that the shifts the Complainant missed had been covered by her own schedule.

72) Mangeri telephoned the Complainant on Tuesday morning, May 19.

73) Mangeri told the Complainant by telephone on May 19 the substance of a written entry in the Complainant's personnel file to the effect that Casa Toltec was unable to employ her due to "memory and her problems" but would assist with a reference for other employment.

74) When Mangeri called the Complainant on May 19, she asked if that had been the Complainant on television the previous evening. She told the Complainant that Mary Arrietta had seen the broadcast. She asked if the Complainant or her husband were gay or bisexual, and stated that "Sam and Mary" were upset. She called back later stating that the Respondents had said that the Complainant working there was bad for business and that they must let her go, but they would give her a reference.

75) The Complainant gave Mangeri the telephone number of SHANTI so that Mangeri could verify that Respondents' customers were not put at risk by the Complainant's employment at Casa Toltec.

76) During the Agency investigation of the Complainant's allegations, the Agency investigator interviewed witnesses and summarized each interview. The summary was not verbatim, but included those items the investigator believed relevant. Statements bearing directly on the issues in the case were recorded as accurately as memory would allow. The form of the questions asked were not preserved. The length of the summary did not always reflect the length of the conversation it memorialized.

77) Because of the press of other investigations, the Agency investigator did not interview every witness named by the Complainant or by the Respondents. She concentrated on those witnesses who were described as having relevant information.

78) Respondent did not see the television broadcast upon which the Complainant revealed her HIV infection, but stated that he had heard about it by the time the Complainant came in on May 19, 1989. He could not recall the source. He wanted to explain to her why he was letting her go, and also to assure her that her infection had nothing to do with it.

79) When the Complainant came to the restaurant on May 19, she was accompanied by a friend. She wanted the friend to be present in any discussion she had with Respondent. Respondent refused to allow the friend to be present and the Complainant refused to discuss the matter with Respondent alone. Respondent did not meet with the Complainant to discuss her discharge.

80) A series of ruled sheets of paper with notations on them came from the Complainant's "personnel file" at Casa Toltec. It contained notes of events involving and comments upon the Complainant. The handwriting was Mangeri's, except for the markedly different hand-printed marginal notes, which were entered by Respondent.

81) In its entirety, this narrative portion of the Complainant's personnel file consisted of three pages as follows (in blue ink, unless otherwise noted):

"Debbie Carper Phone (503)344-4780
Right Handed
Eugene, Or 97401 SS#
Health: Good D.O.B."

[in black:] "Personal Review"

"1.) Debbie did not show up for work. she stated she did not Have the proper clothes for work. Debbie had fours day prior to the day to working to prepare. She was advanced 20.00 to purchase shoes."

[in black:] "I'm a helper not a taker 20.00 was never returned."

[In left margin in black:] "Bonnie Dunten waitress Sam, Bud & Wife"

"2.) April 11 1987. [edited in black to: "May 11"] Debbie walk out of work out of anger, left other waitress with full house, also left 3 tables unattended, with out taking out orders."

"3) May 6, 1987 Debbie has made numerous errors on her tickets. she has been informed Twice about all errors. has a habit of talking back [,] when in a rush." ["Twice" is traced over in black] [in black:] "mad temper. Use's Foul language"

Second page:

"4.) May 14th 87 Debbie has informed me, she can not function after 6 hours of work. tends to forget orders from Customers, runs out of Engerny,"

[In right margin in black]: "when confronted about her mist errors she admitted brain damage From drugs" ["mist" is lined out]

"5.) May 15th Tonight Debbie left early, Sam, stated she was to be replaced. to many errors. not able to keep to schedule,"

[in black]: "Refer to last page Fri 15th State Employment"

"Debbie has been employed 30 days and has requested 6 days off. was offered to make up time, she refused. at time of hire She wanted full time, she was given 35 hours, by May 15th She had drop to 20-25 hours if at all that"

"Case out of my authority Sam was contacting Debbie by phone to terminate."

Third page [in green:]

"6.) I informed Debbie due to memory and her problems, we were not able to have her at Casa Tol Tec. She stated She understood, we offered if She needed a reference for other employment we would be glad to assist"

[in black]: "5-15-87 Dismiss Debbie From Casa Tol-Tec"

82) The entry in Mangeri's handwriting numbered "6)" on the third and final page of the personnel file was made after May 15, 1987. Immediately following that undated entry is Respondent's insertion:

"5-15-87 Dismiss Debbie From Casa Tol-Tec"

83) The Complainant's filing with the Agency over her discharge was the subject of newspaper and television news coverage in May 1987.

84) Prior to her employment by Respondents, the Complainant had a medical history of drug and alcohol abuse, and had exhibited behavior which had resulted in her being prosecuted in early 1986. As a condition of probation she was referred to the Lincoln County Mental Health Program for treatment in connection with substance abuse. She was diagnosed as HIV infected in December 1986. She had not been gainfully employed for many months, and was partly supported by public assistance.

85) On March 23, 1987, Dr. David M. Bice of Newport, the Complainant's physician, wrote the following:

"Deborah will be disabled for at least 60 days because of medical problems."

This enabled the Complainant to continue obtaining public assistance. On April 2, 1987, in completing public assistance form AFS 729, "Medical Evaluation Report," Dr. Bice's findings as to "Limitations and Capacities" were "tires easily, depressed."

86) Both before and after her employment with Respondents, there were a number of influences in the Complainant's life that adversely affected her mental and emotional stability and well-being, including a stormy relationship and divorce with her husband, her multiple substance abuse, the effect of the HIV diagnosis, and chronic depression.

87) Following her discharge by Respondents, the Complainant suffered loss of appetite, depression, disturbed sleep, and a resumption of alcohol use. She had experienced these symptoms in the past, but none of them arose during the time she was employed by Respondents. Her alcoholic relapse was not the result of her discharge.

88) The Complainant was extremely discouraged by the loss of employment. She had believed that she had a right to work and that she was performing satisfactorily. She had no reason to believe that she wouldn't resume her regular schedule.

89) The Complainant did not consistently seek employment. Because of the publicity attendant to the discharge, she believed potential employers could identify her. Her only application between May 19 and October 27 was at the Applegate Care Center. She was not hired.

90) In September 1987, Dr. Mark S. Heerema, M.D., of Eugene, as the Complainant's physician, in completing an AFS 729 Medical Evaluation Report, entered under "Limitations and Capacities" the following:

> "The patient is limited by the fact that her diagnosis is well known in the community through newspaper and other publicity and thus she is not readily employable in her former occupation as a food handler. She is presently seeking another occupation. Her disease does limit her strength and endurance and thus any occupation will have to take that into consideration."

91) In a later report on October 27, 1987, Dr. Heerema observed:

> "The patient has some trouble with energy secondary to her disease and thus cannot tolerate regular employment. She can still perform activities of daily living and possibly some part time clerical work. She is unable to drive a car and would be unable to assume significant responsibilities, etc., such as employment."

92) The Complainant averaged over six hours each of the 15 days she worked. Had she remained employed, working five days a week, she would have worked 32 hours per week from May 19 to October 27, 1987, when she was no longer employable. Her earnings during this period of 22 weeks would have been $2358.40.

93) The testimony of both Mangeri and Respondent regarding the timing of the various entries on the personnel record tends to discredit that record as well as their own individual testimony. Both testified at great length concerning Respondent's upset at finding that Mangeri had permitted the Complainant to leave an hour early, and his reaction, allegedly on May 15, of insisting on her immediate discharge. This and other inconsistencies, cited below, impaired their credibility.

94) Sylvia Mangeri, Respondents' manager, made many statements which were inconsistent with documents which she authored and with other evidence. She insisted that she interviewed the Complainant on April 14, 1987, although the application upon which she testified she made notes of the interview, bears a date of April 17, 1987. She marked a "Restaurant Policies" document "Debbie Carper Hired April 14 1987" but also marked a similar document "Hired 4-17-87 SM" and could not recall why there were two such documents, why the dates differed, or whether anyone else was hired on either date. She testified that a check-mark beside an item on these documents confirmed that the item had been read to the Complainant, then attempted to explain the absence of check marks by the Food Handlers Card and Alcohol and Beverage Permit items as indicating that the Complainant needed to obtain them. She testified that she scheduled the Complainant six days per week, while a response to the Agency from Respondent stated that the Complainant's work schedule was five days per week. She testified that waitresses were sometimes sent home when business was light or when the restaurant closed early, and that the Complainant frequently left early because she was tired, but could not specify how many times the Complainant left early for any reason. She described the personnel record as a contemporaneous record of positive and negative employee performance, then testified to aspects of the Complainant's performance which were not noted. She testified that the Complainant complained of tiredness during her first week of work, but the notation regarding this appears in the personnel record dated May 14. She testified that she had discussed performance problems at least once a week with the Complainant and that she wrote it down. She testified to customer and waitress complaints about the Complainant, but there are no notations regarding rudeness, poor performance, or poor service. She was inconsistent regarding her reaction and that of Respondent to the Bartzat incident. Her personnel record notation regarding the Complainant leaving in anger was dated several days after the Complainant and Dunten last worked together. She was uncertain and inconsistent regarding when she had attempted to call the Complainant and what was said when she reached the Complainant on May 19, denying at first that there was any conversation beyond notice that Respondent wanted to talk to her. Her written record states that Respondent was to call. She testified that she did not see the television broadcast, that she did not know whether either of the Respondents saw it, that she didn't recall whether the restaurant was open on May 18 or whether Respondent worked that day. It is not believable that she knew of no customer complaints over the "no substitution" policy. The Forum finds it baffling that, given the several deficiencies attributed to the Complainant, she could still recommend her to another employer. Accordingly, her testimony was given little weight when it conflicted with other credible evidence in the record.

95) Respondent Sam Arrietta was also inconsistent in his testimony. In addition, he appeared resentful and argumentative, sometimes attempting to answer a question with a question. He testified to the meaning of the check-marks on the "Restaurant Policies" document, confirming Mangeri's testimony, but hastened to add that "Sylvia does the hiring" when questioned further, and stated he did not know what records of food handler cards or OLCC

permits were kept. His self-description as a helping person who wanted to assist the Complainant in her recovery because of his own status is severely eroded by the decision to discharge her over a one hour absence, when he knew permission had already been given for the weekend and he had previously been lax with the Complainant's performance. He testified vaguely to all of the problems he observed with her performance, complaints he had received about her service, and his concern about her dependability as a full-time employee, none of which was documented nor communicated to the Complainant. He stated that he remembered the date as May 15 because he had to file his taxes, which were due that day, but unaccountably failed to explain further when questioned about the type of filing he referred to. His various reasons for discharge and his testimony that they all "piled up" to contribute to his decision when the Complainant left one hour early belie his description of himself as "easy-going." In the face of his manager's testimony that item six on page three of the personnel record was recorded after May 15, he testified that all of his notations were made on the 15th. The Forum again finds it baffling that, given the several deficiencies attributed to the Complainant, Respondent could still recommend her to another employer. Accordingly, his testimony was given little weight when it conflicted with other credible evidence in the record.

96) The testimony of the Complainant was found to be credible. She testified on material points consistent with her original statements to the Agency. She acknowledged some memory deficiency, which was confirmed by the medical records, and which generally involved questions concerning her medical history. The Forum did not find her discredited or impeached on any material point. She testified quietly, if somewhat intensely, and acknowledged her performance difficulties with the tickets. Although her memory of dates was weak, the Forum found no reason to determine that her testimony was anything except reliable and credible.

97) The testimony of Pamela McBride was found to be unreliable and not credible. She testified that she and her daughter had dinner at Casa Toltec on May 15, 1987, and that she knew the date because her husband and son were out of town that day and she had marked that on her calendar. She testified that she had kept the calendar because she saves calendars "and things" to note birthdays, and for this reason she recalled in March 1988 the incident described in her letter. The Forum finds this witness's reason for recalling the date of the incident about which she testified is simply not credible.

ULTIMATE FINDINGS OF FACT

1) The Respondents Sam and Mary Arrietta, under the assumed business name of Casa Toltec, operated a restaurant in Eugene, Oregon, utilizing the personal service of six or more employees and controlling the means by which such service was performed at times material herein.

2) The Complainant Debbie Carper, now known as Debbie Jensen, worked at Casa Toltec as a waitress from April 20 to May 19, 1987, at a wage of $3.35 per hour for hours worked. She was HIV infected at times material herein, and had been advised by her personal physician that she had "ARC," an acronym for "Aids Related Complex," a stage of HIV infection.

3) "HIV infection" describes an infectious, chronic, and progressive blood-borne disease commonly referred to as "AIDS", which is an acronym for "Acquired Immune Deficiency Syndrome," the final and generally fatal stage of the infection.

4) HIV is spread through introduction of infected blood or blood products into the bloodstream. The virus does not readily survive outside the body and blood environment. It is not reasonably medically probable that the virus can be spread by a handshake or in ordinary office or workplace contact.

5) Sylvia Mangeri, Respondents' manager, interviewed and hired the Complainant for eventual full time work. The Complainant did not tell Mangeri that she had ARC or HIV infection, or that she suffered from depression and was taking antidepressant medication. The Complainant told Mangeri that her husband was terminally ill and that she needed to go to two weekend counseling sessions. Mangeri said it could be arranged depending on the help situation at the restaurant.

6) Casa Toltec was open 11:30 a.m. to 9:30 p.m. Monday through Thursday, 11:30 a.m. to 10 p.m. Friday and Saturday, and 4 p.m. to 9:30 p.m. on Sunday at times material herein. The Complainant worked varying shifts. She was expected to serve customers, handle the till, clean, mop, keep the restrooms clean, do sidework, stock, and be on call when needed. Waitresses, including the Complainant, were sometimes sent home when business was light, or when the restaurant occasionally closed early.

7) With the exception of difficulties she had with some order tickets, and one incident where she left in anger while serving a customer, there were no documented complaints about the Complainant's performance. The Complainant worked a total of 15 work days.

8) Originally, the Complainant asked for two weekends off for the counseling: May 8, 9, and 10, and May 15, 16, and 17. This time off was allowed, however, she worked May 15, and had permission to be off the weekend of May 16-17. She left at 4 p.m. on the 15th with the manager's permission. When she left, both Mangeri and Respondent wished her a pleasant weekend and voiced an expectation of seeing her Tuesday.

9) The Complainant appeared on a television newscast in Eugene on May 18, 1987, in which she asserted that she was HIV infected. She didn't mention where she worked.

10) The Complainant was notified on Tuesday morning, May 19, 1987, that she was discharged when Mangeri called and asked if the Complainant had been on television the previous evening, told the Complainant that Mary Arrietta had seen the broadcast, and stated that "Sam and Mary" were upset. The final decision to discharge the Complainant was made by Respondent.

11) The Complainant later picked up her check, accompanied by a friend. Respondent refused to allow the friend to be present and the Complainant refused to discuss the matter with Respondent alone, so Respondent did not meet with the Complainant to discuss her discharge.

12) The Complainant's filing with the Agency over her discharge was the subject of newspaper and television news coverage in May 1987.

13) Prior to her employment by Respondents, the Complainant had a medical history of drug and alcohol abuse, and of emotional and mental problems. She was diagnosed as HIV infected in December 1986. She had not been gainfully employed for many months, and was partly supported by public assistance.

14) Both before and after her employment with Respondents, there were a number of influences in the Complainant's life that adversely affected her mental and emotional stability and well-being, including a stormy relationship and divorce with her husband, her multiple substance abuse, the effect of the HIV diagnosis, and chronic depression.

15) Following her discharge by Respondents, the Complainant suffered loss of appetite, depression, disturbed sleep, and a resumption of alcohol use. She had experienced these symptoms in the past, but none of them arose during the time she was employed by Respondents. The alcoholic relapse was not the result of her discharge. The Complainant was extremely discouraged by the loss of employment. She had believed that she was performing satisfactorily. She had no reason to believe that she wouldn't resume her regular schedule.

16) She did not consistently seek employment. She applied at the Applegate Care Center and was not hired.

17) Between May 19 and October 27, 1987, when she was no longer employable, the Complainant would have earned $2,358.40 had she remained employed with the Respondents.

18) HIV infection is a physical impairment that substantially limits one or more major life activities.

19) The Complainant was discharged from employment by Respondents because she had a physical impairment which did not prevent the performance of the work involved.

CONCLUSIONS OF LAW

ORS 659.400 provides in pertinent part:

> "As used in ORS 659.400 to 659.435, unless the context requires otherwise
>
> "(1) 'Employer' means any person who employs six or more persons * * *"

At all times material herein the Respondent was an employer subject to the pertinent provisions of ORS 659.010 to 659.435 and of OAR 839-06-200 to 839-06-255.

2) ORS 659.010 provides, in pertinent part:

> "* * *
>
> "(11) 'Person' includes one or more individuals [or] * * * corporations * * *.
>
> "(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

ORS 659.040 provides, in pertinent part:

> "(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof. * * *"

ORS 659.435 provides, in pertinent part:

> "Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040 * * * The Commissioner of the Bureau of Labor and Industries * * * shall have the same enforcement powers, and * * * the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 * * *."

OAR 839-06-220 provides:

> "An individual * * * who claims a violation of ORS 659.425, may file a complaint with the Civil Rights Division (see OAR 839-03-025 – Filing a complaint and ORS 659.435)."

ORS 659.050 provides, in pertinent part:

> "(1) After the filing of any complaint under ORS 659.040 * * *, the commissioner shall cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents in the complaint the names of such persons may be added as respondents thereto. If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110 * * *."

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein, and the authority to eliminate the effects of any unlawful employment practice found.

3) ORS 659.425 provides, in pertinent part:

> "(1) For the purpose of ORS 659.400 to 659.435, it is an unlawful employment practice for any employer * * * to bar or discharge from employment * * * because:
>
> "(a) An individual has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved;
>
> "* * *

"(c) An individual is regarded as having a physical or mental impairment."

ORS 659.400 further provides, in pertinent part:

"(2) 'Handicapped person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(3) As used in subsection (2) of this section:

"(a) 'Major life activity' includes, but is not limited to * * * employment * * *.

" * * *

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; * * *"

OAR 839-06-205 provides, in pertinent part:

"As used in these rules, unless the context requires otherwise:

" * * *

"(2) 'The attitude of others toward such impairment' means an opinion, evaluation, or belief, held by another person or persons toward the individual's perceived or actual physical or mental impairment.

" * * *

"(7) 'Physical or mental impairment' means an apparent or medically detectable physical or mental condition which substantially limits one or more major life activity, as defined in ORS 659.400(3).

" * * *

"(10) 'Supervisor' means a person who exercises direct supervisory authority over the position and who has the authority to hire and discharge, or to effectively recommend hiring and discharge."

The Complainant was a handicapped person at all times material herein.

4) The conduct of Respondents Arrietta, dba Casa Toltec, in discharging the Complainant due to her HIV infection was a violation of ORS 659.425(1)(a).

5) The actions, inactions, statements, and motivations of Sylvia Mangeri are properly imputed to the Respondents herein.

6) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

This case presents a difficult factual issue. There is no doubt that the Respondents discharged the Complainant. There is no dispute that the notice of that discharge, that is, the first that the Complainant knew of it, occurred on the morning following her appearance on a news broadcast in which she had revealed publicly that she was infected with the HIV virus, the virus which causes AIDS. Since she was so infected, she was as a matter of law a handicapped person. She has a physical impairment which substantially limits major life activities: it is life-threatening. It is a violation of statute, an unlawful employment practice, to discharge her because of that condition so long as it does not prevent performance of the work involved.

But the Specific Charges are not defended against on the basis of the condition preventing performance. The testimony of Dr. Fleming was undisputed that HIV infection presents no danger to others through the handling of food, utensils, and the like by the infected person. Rather, the employers took the position and presented testimony and other evidence intended to establish that they were unaware of any impairment and that they found the Complainant's performance inadequate and discharged her accordingly. The Respondents apparently rely on their third affirmative defense, which was to the effect that the Complainant failed to adequately perform her waitress duties. This is necessarily coupled with an assertion that the termination decision was made before the employer had any knowledge of the Complainant's HIV infection.

Respondents' other "Affirmative" Defenses

The Forum is puzzled by the Respondents' other defenses, denominated "Affirmative Defenses," partly because there was little or no attempt to present evidence to establish them factually, but principally because the Forum doubts that, even if proved, they would form any defense to the charges. Also, in resisting a claim, a party does not necessarily have to establish an "affirmative defense" to defeat a charge which depends on the drawing of an inference. The nonexistence of the inferred fact may be shown under a mere denial. *City of Portland v. Bureau of Labor and Industries,* 298 Or 104, 690 P2d 475, fn 5 (1984) *(citing Judsen v. Bee Hive Auto Service Co.,* 136 Or 1, 294 P 588, 297 P 1050 (1931)).

The first affirmative defense alleged that the Complainant breached a duty to her employer not to conduct herself with such impropriety that she brings disrepute upon the employer or upon the business in which the employer is engaged. There is no suggestion in the evidence or in the Respondents' argument that this Complainant behaved in any manner which brought or could bring disrepute upon the employer. If the pleading means the revelation of the Complainant's infection, it is far off the mark.

The second affirmative defense alleged that Complainant breached a duty of loyalty to the employer. Again, the Forum is unable to fathom any connection between the testimony and documents produced, on the one hand, and the accusation of handicap discrimination on the other.

The fourth affirmative defense alleged that the Complainant made misrepresentations in her employment application. There was some evidence that the Complainant's listing of her

prior experience and of her educational attainment on the application were inaccurate. But there was no claim or evidence that the employer relied on this information at hire, or that an experience or education minimum was sought. Therefor, any false information was in no way material.

The fifth affirmative defense alleged that the Complainant never intended to continue her employment with the employer. Again, the meaning of the allegation escapes the Forum, unless it is intended to negate or reduce any wage loss from a prohibited discharge. Certainly there was no evidence that the job was considered by the Complainant to be a temporary job.

The sixth affirmative defense denied discrimination on the basis of disability, but asserted that if disability was the reason for termination, the termination was actually based on the Complainant's personal background. There was some evidence regarding the Complainant's background, none of which other than the acknowledged substance abuse problems was shown to be known to the employer at the time of the adverse employment action. The Forum speculates that the pleading's intent may be to set up a justification for what might otherwise be discrimination, but the wording is too vague for decision.

The Third Affirmative Defense

As to the performance based defense, however, a good deal of proof, not all of it credible, was offered. Respondent attempted to establish documentation of some of the Complainant's shortcomings, but was unsuccessful in convincing the Forum that the entries in the "personnel record" were either contemporaneous or accurate. The documentation of the time records also was not considered to be sufficiently probative. The bare assertion that an employee left early due to fatigue without a notation on a particular date to that effect, and with no credible testimony about a date certain, is of little value where there is evidence that shifts varied and that others were sent home early at the employer's convenience. The available time records confirm the hours that the Complainant (and others) worked. There is no comparative day-to-day schedule to assist in ascertaining whether any employee worked the full time planned, worked past the full time planned, or reported to work late or at all. The manager's oral testimony in this regard was too inconclusive, vague, and self-serving to be reliable.

Several of the employer's customers testified to sub-standard performance by the Complainant. With the exception of the situation involving Mr. Bartzat, there was no showing that any of the other "poor service" complaints were known to Respondents or their manager prior to the publicity generated by the Complainant's filing of the administrative complaint in this case. The witnesses Tapp, Johnson, and Hardt all testified to the effect that they reported their dissatisfaction with the Complainant's service after seeing the Complainant's picture in a newspaper in connection with her discharge from the Respondents' restaurant. Tapp in particular stated he contacted Respondents after recognizing the Complainant and reading a newspaper article, because he thought that the Respondents were "very nice people" "in a can of worms." Because these complaints were after the fact of the discharge, regardless of when the discharge occurred, the Forum has disregarded this area of testimony and has not evaluated any motivations or inconsistencies affecting its credibility.

The situation involving Elmer Bartzat presents a different dilemma for the Forum. The testimony places the incident sometime in May. The manager testified that it was around May 11, and the written notation is dated May 11. But the payroll records clearly show that the Complainant did not work on May 11, a Monday. Neither was she at work the previous Friday or Saturday, and the restaurant was closed on Sunday, May 10. Her last day at work prior to May 11 was Thursday, May 7. Testimony established that Dunten was the second waitress present, but the records show she did not work on May 7. The last time prior to May 11 that Dunten and the Complainant worked together was Sunday, May 3, over a week before the recorded entry about the incident. Whenever in point of time it happened, Dunten testified that the manager said it was "no big deal." In light of the belated documentation and absence of corrective action, the Forum is inclined to agree, and is reluctant to accord the incident the level of importance now asserted by the Respondents.

The proof offered by Respondents regarding the Complainant's job performance is intended to establish a reason for discharge. At hire, they had no knowledge of the Complainant's disability or of any accompanying duty to accommodate. Any reason not prohibited by law would be sufficient upon which to base a discharge decision. Unsatisfactory performance would be such a reason, and might also constitute a legitimate, non-discriminatory reason for discharge if the Respondents knew that she was a handicapped person. From the Respondents' perspective, their proof becomes doubly important in negating the substance of the Agency's charge that, when her disability did become known to them, they fired her because of it.

If the discharge decision was made on the 15th, emanating from a pattern of known performance problems and a final unauthorized early departure, the issue of discrimination based on HIV infection is moot, since there is no evidence or claim that the employers' knowledge of the condition pre-dated the May 18 broadcast. The Forum has rejected the attempt to show unsatisfactory performance by rejecting much of the evidence thereof as either not credible or not known at the time. The Forum has rejected the proof offered to corroborate the 15th as the decision date because it is suspect. If a notated calendar reminded the witness McBride of what otherwise must have been an unmemorable date, then the Forum should have had the opportunity to assess either the notation or the reason for its absence. Neither was offered.

It is for these reasons that the Forum finds that the Respondents discharged the Complainant because they learned that she was HIV infected. In doing so, they committed an unlawful employment practice by discharging an individual with a physical impairment which did not prevent the performance of the work.

Remedy

The Forum has previously reviewed the legal standards for awarding back pay:

"The purpose of back pay awards in employment discrimination matters is to compensate for the loss of wages and benefits which the complainant would have received but for the respondent's unlawful discrimination. Such awards are calculated to make the complainant whole for injuries suffered because of the discrimination. *In the Matter of K-Mart Corporation*, 3 BOLI 194, 202 (1982).

"In determining back pay awards, the equitable principle of setoff applies. This Forum has previously applied this principle as codified in federal law:

'Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. Title VII of the Civil Rights Act of 1964, as amended, Section 706(g).' *In the Matter of the City of Portland*, 6 BOLI 203, 210 (1987).

"This principle of law denies a complainant recovery for harm he or she might reasonably have avoided. In other words, it relieves the respondent of liability for any losses that the complainant could reasonably have avoided. *City of Portland, supra*, at 210.

"Pursuant to OAR 839-30-105 (10), Respondents had the burden of showing that Complainants failed to mitigate their damages. *See also In the Matter of Lucille's Hair Care*, 3 BOLI 286, 302, (1983), *aff'd, Ogden v. Bureau of Labor* , 299 Or 98, 699 P2d 189 (1985).

"Complainant Gray did not seek alternative employment for around two months after her discharge from Respondents' cafe. For that period, Complainant is not entitled to back pay because she voluntarily excluded herself from the job market, and thus failed to mitigate her damages. * * * *In the Matter of Lee's Cafe*, 8 BOLI 1, 20-21 (1989).

The Forum has found what the Complainant would have earned but for the unlawful discharge. However, the evidence is clear that she did not seek further employment following the discharge, with the exception of the application at Applegate, until October 27, when Dr. Heerema finally determined that the Complainant was no longer employable. The Forum does not and cannot speculate on whether the positive influence of employment might have prolonged the Complainant's employability any more than it does or can speculate on the possibility that properly documented future performance deficiencies might have reduced the length of employment. Without some evidence that her emotional state precluded a diligent effort to secure employment, an established failure to mitigate reduces or eliminates a claim for wage loss.

The more difficult damage question is the issue of humiliation, distress, embarrassment, and impaired personal dignity, that is, emotional or mental suffering. The Complainant is a multiply

troubled individual. She testified that the discharge was unexpected and unjustified. She attributed it to an activity she believed she had a right to do. It is not speculative to conclude that up until the sudden discharge, the employment had a positive influence on her mental and emotional state (*See* Finding of Fact 17). While she had experienced the loss of appetite, depression, and disturbed sleep previously in connection with her other stresses, there was no evidence that any of these complaints were present while she worked. She was extremely discouraged by the loss of employment. After overcoming a number of negative situations, she had finally been able to enter a productive period in her life. The discharge changed all that. For at least a brief period, the shock, disappointment, and disturbance generated by the discharge was the principal stressor affecting the Complainant's emotional well-being.

Awards for mental suffering depend on the facts presented by each Complainant. Respondents must take complainants as they find them. Here, the Forum found that Complainant experienced mental suffering due to the discharge. She suffered mentally and emotionally from conduct for which Respondents are directly liable.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondents are hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Debbie Carper Jensen, in the amount of:

a) Two Thousand Five Hundred Dollars ($2,500), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employee because of the employee's physical or mental impairment.

In the Matter of

George Joseph and Rosemarie Joseph, dba G & R Dunkin' Donuts, and DUNKIN' DONUTS, INC., Respondents.

Case Number 24-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued December 13, 1989.

SYNOPSIS

Respondent Dunkin' Donuts, Inc. was a franchisor to Respondents Joseph, was not Complainant's employer, and was therefore dismissed

from the case. The Commissioner held that Respondent George Joseph did not sexually harass Complainant, that his attention to Complainant did not cause her to resign, and that he did not violate ORS 659.030(1)(a) or (b). ORS 659.030(1); OAR 839-07-550, 839-07-555.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 4 and 5, 1989, in Room 311, State Office Building, 1400 S.W. 5th Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. George Joseph and Rosemarie Joseph, dba G & R Dunkin' Donuts (hereinafter Respondent George Joseph or Respondent Rosemarie Joseph or Respondents Joseph), were represented by Gary M. Bullock and Steven M. Claussen, Attorneys at Law, Portland. Dunkin' Donuts, Inc. (hereinafter Respondent Dunkin') was represented by Karen R. Tashima, Attorney at Law, Portland. Counsel for the respective Respondents presented a Summary of the Case, argued the law and facts, interposed objections and motions, examined the witnesses, and introduced documents. Kerry Ross (hereinafter the Complainant) was present throughout the hearing.

The Agency called as witnesses the following: the Complainant; Betsy Wittren and the Complainant's sister Kelly Ross, both former co-workers of the Complainant (both by telephone); and Harold Rogers, a Senior Investigator with the Agency.

The Respondents Joseph called as witnesses: Christine Kuiawa, Anna Humphrey, Karen Patzer, Keith Duncan, Greg Remsburg, David Christman, and Steve McAuley, current or former employees of Respondents Joseph; and Respondents Rosemarie Joseph and George Joseph. Respondent Dunkin' called as its witness Jim Miller, Franchise District Manager.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Rulings on Motions, Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS ON MOTIONS AND OBJECTIONS AT HEARING

1. Ruling on Respondent Dunkin' Motion to Dismiss

At the commencement of the hearing, Respondent Dunkin' through counsel made a motion to dismiss the Specific Charges as to Respondent Dunkin' for the following reasons:

a) Respondent Dunkin' did not employ anyone directly or through an agent at the business known as G & R Dunkin' Donuts from 1986 to the date of hearing;

b) George and Rosemarie Joseph are independent contractors neither authorized to act on behalf of Respondent Dunkin' nor so acting in regard to the employment and supervision of the Complainant;

c) Said Respondents Joseph implement their own policies in the daily operation of the business, including employment policies.

In addition, the Respondent Dunkin' and the Respondents Joseph filed a signed proposed stipulation regarding Respondent Dunkin's status as an employer in this case, which recited substantially these reasons. The Agency would not so stipulate.

The Hearings Referee reserved ruling on the motion. Counsel for Respondent Dunkin' renewed the motion to dismiss at the close of the Agency's case, and again at the close of all the evidence. During the hearing counsel for Respondents Joseph pointed out that both the original and the amended complaint contained what counsel termed a "judicial admission" in that each recites that Mr. Joseph is the owner of the business and makes no mention of Respondent Dunkin'. In each instance, the Hearings Referee again reserved a ruling.

For reasons more fully explained in the Opinion portion of this Order, the motion to dismiss of Respondent Dunkin' Donuts, Inc. is hereby GRANTED.

2. Ruling on Respondents Joseph's Objection to Telephone Testimony

At the commencement of the hearing, counsel for Respondents Joseph stated an objection to the testimony of Kelly Ross and Betsy Wittren, two witnesses whom the Agency intended to present by telephone. At that time, the Hearings Referee overruled the objection, stating that telephone testimony in administrative hearings was permissible, and that this Forum's rules so provide. Respondent's counsel renewed his objection, pointing out that the unavailability of the witnesses in Oregon had deprived the Respondents Joseph of the opportunity to depose these witnesses. The Hearings Referee reserved ruling on that ground of the objection.

Telephone testimony is acceptable in Bureau of Labor and Industries contested case hearings. Not only is the presentation of witness testimony allowed, OAR 839-30-105(12), but with proper notice, an entire hearing may be conducted by telephone. OAR 839-30-070 (9). It is this latter notice which counsel may have mistaken. In the case of an individual telephone witness, the notice required is for the purpose of the Forum's planning in conducting the hearing. OAR 839-30-105(12)(c).

The normal rules of discovery apply to Bureau of Labor and Industries contested case hearings. *Ogden v. Bureau of Labor and Industries,* 299 Or 98, 699 P2d 189(1985). As the Hearings Referee observed at hearing, a party is generally responsible in civil proceedings for locating and deposing a potential witness. Since the record does not reflect that discovery was being delayed or withheld by the Agency, or that Respondents sought the Forum's assistance in deposing the witnesses, the Forum cannot rule that the Respondents were deprived of the opportunity for discovery.

The objections of Respondents Joseph to the telephone witnesses are

OVERRULED, both as to the general acceptability of telephone testimony and as to the alleged lack of opportunity for deposition.

3. Ruling on Respondents Joseph's Objection to Documents, Request for Cross-examination, and Motion to Exclude

Prior to hearing, on March 29, 1989, counsel for Respondents Joseph filed a document objecting to the Agency introducing written investigative statements of persons interviewed during the Agency's investigation (Betsy Wittren, Kelly Ross, Dwayne Schaecher, and Camille Laizans), which statements were portions of the Agency's case summary, and requesting the ability to cross-examine those persons and the investigator preparing their statements. The objection and request were based upon OAR 839-30-120(6) and (7). At hearing, counsel for Respondents Joseph moved to exclude the subject statements based on the status of the statements as hearsay and being unreliable under OAR 839-30-120(1) and based on said statements containing descriptions of alleged prior acts of Respondent George Joseph which were irrelevant under OAR 839-30-120(2) to the issue of the acts complained of in the specific charges. The exclusion sought was also based upon Respondent George Joseph's constitutional right to confront witnesses against him. The Hearings Referee, in admitting the administrative exhibits at the commencement of the hearing, reserved ruling on the admission of the Agency case summary as well as on the admission of the case summaries of the respective Respondents.

OAR 839-30-120(6) provides that a participant* give 10 days' notice prior to hearing to other participants of any writing intended to be introduced at hearing and that unless another participant requests cross-examination within five days prior to hearing, the writing may be received. OAR 839-30-120(7) provides that if cross-examination is requested within five days prior to hearing, and the participants are informed within that time that the author will not appear for cross-examination, the writing may nonetheless be received, provided that the Hearings Referee determines that the contents "are of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs" and that the participant "requesting cross-examination would not be unduly prejudiced * * * by the lack of cross-examination."

The language of OAR 839-30-120 is obviously based on ORS 183.450 (1). Respondents Joseph cite *Menges v. Board of Commissioners,* 290 Or 251, 621 P2d 562 (1980) as supporting the position that the statements are inadmissible, but that case merely states that:

> "in administrative proceedings hearsay evidence is commonly received and accorded probative value, at least when received without objection * * *."

It does not go so far as to state, or even to suggest, that hearsay objected to is automatically not admissible. As

* "Participant" or "participants" includes the charged parties and the Agency. OAR 839-30-025(17).

to the "commonly relied upon" argument, counsel cites *Higley v. Edwards,* 67 Or App 488, 678 P2d 775 (1984), for the proposition that unsworn statements are not worthy of such reliance. But the pertinent language of the court's comment in that case, in discussing the ORS 183.450(1) standard, includes the following:

> "We conclude that the proffered evidence did not comport with the standard recognized in ORS 183.450(1). We hold that in a matter of this kind, a reasonably prudent person would not rely on the unsworn and uncorroborated statement of a convicted felon." *Higley, supra.* (Underlined matter eliminated in counsel's memorandum, but included in the original.)

Other cases cited by the Respondents Joseph on the point of right to cross-examination are either criminal cases or public employment due process issues, or are otherwise not applicable here.

In any event, the Forum's rules and by implication the underlying statute address themselves to the sound discretion of the trier of fact. It is the weight to be accorded the challenged evidence, and not its admissibility, that the Hearings Referee must ultimately determine from the source and type of evidence offered. In this instance the argument against the challenged evidence is largely mooted by the opportunity at hearing for cross-examination of Kelly Ross, Betsy Wittren, and Senior Investigator Rogers.

As to evidence of prior acts, at the risk of redundancy the Forum again observes that this is an administrative contested case proceeding. It is not a criminal case. *Nichols v. Board of Pharmacy,* 61 Or App 274, 657 P2d 216 (1983), cited by these Respondents, although a proceeding under the Oregon Administrative Procedures Act (ORS chapter 183), is inapplicable. It deals with imputation of guilt from the finding that the licensee's employer had been found in violation on the same facts; it does not address prior acts of the licensee.

In the context of discrimination law, where the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is crucial to the inquiry, and thus relevant. How other members of a complainant's protected class are treated as opposed to others not of that class is also relevant. Comparator evidence is common in employment discrimination cases. OAR 839-05-010 (2). Counsel elicited testimony about George Joseph's treatment of employees which was designed to negative any inference of adverse treatment based on the Complainant's sex; in this Forum, treatment of employees is a two-sided coin.

The Forum overrules Respondents Joseph's objection under OAR 839-30-120 to the Agency case summary, receives in evidence the subject exhibits, and denies the motion to exclude evidence of alleged prior acts. As stated, the cross-examination issue was largely resolved by the hearing itself.

4. Ruling on Respondents Joseph's Motion to Dismiss on Constitutional Grounds

At the commencement of the hearing, counsel for Respondents Joseph

renewed the motion to dismiss on constitutional grounds, which had been denied prior to hearing. In addition, the answer of Respondents Joseph interposes the Forum's alleged lack of jurisdiction, citing the same grounds as the motion to dismiss.

The motion of Respondents Joseph and their "Second Affirmative Defense, (Lack of Jurisdiction)" are based on a) Article I, section 17, and b) Article VII, section 3 of the Oregon Constitution, which, in pertinent part, provide respectively as follows:

> a) "In all civil cases the right of Trial by Jury shall remain inviolate."
>
> b) "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, * * *"

In its pre-hearing denial of Respondents' position, the Forum merely declined to declare invalid the presumptively valid legislative scheme underlying the Bureau's contested case proceedings in discrimination cases. But this Forum and the courts have previously ruled on the cited constitutional issue adversely to the Respondents' position. *In the Matter of Fred Meyer, Inc.*, 1 BOLI 84 (1978). The Commissioner cited *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971) and *School District No. 1 v. Nilsen*, 271 Or 641, 534 P2d 1135 (1975) in rejecting this attack on the Commissioner's authority. In the appellate opinion resulting from the *Fred Meyer* order, the Court of Appeals stated:

> "[Employer] also contends that the Commissioner's award of damages is unconstitutional because it violates [employer's] right to a jury trial guaranteed by Article I, section 17 and Article VII, section 3 of the Oregon Constitution. This argument was considered and rejected in *Williams v. Joyce*, 4 Or App at 500-502, 479 P2d 513, and we have no reason to reconsider that holding." *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979) (remanded on other grounds); *In the Matter of Fred Meyer, Inc.* (Order on Remand), 1 BOLI 179 (1979).

Accordingly, the Forum DENIES the motion to dismiss and REJECTS the second affirmative defense of the Respondents Joseph.

FINDINGS OF FACT – PROCEDURAL

1) On October 29, 1987, the Complainant filed a verified complaint with the Agency and on February 25, 1988, the Complainant filed an amended verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of the Respondents.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the amended complaint and finding the Respondents in violation of ORS 659.030(1)(a) and (1)(b).

3) The Agency subsequently initiated conciliation efforts between the Complainant and the Respondents. Conciliation failed and the case was referred to the Agency's Quality Assurance Unit for further action.

4) On January 12, 1989, the Agency prepared and served on the Respondents, and each of them, Specific Charges herein, alleging that the Respondents Joseph and Dunkin' subjected the Complainant to discriminatory treatment based on her female sex through sexual harassment, creating a hostile and intimidating work atmosphere, making the Complainant's continued employment intolerable and causing her to terminate her employment, in violation of ORS 659.030 (1)(a) and (1)(b).

5) With the Specific Charges, the Forum served on the Respondents, and each of them, the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) Included among the Respondents to the original Specific Charges were Yachit Enterprises, Ltd., dba Dunkin' Donuts, and Beverly Browne and Kenneth Browne as owners and corporate officers of Yachit Enterprises, Limited.

7) On January 18, 1989, the Forum received a letter from counsel for Respondents Joseph suggesting that there were improper parties named in the Specific Charges, that said Respondents sought opportunity to depose Agency witnesses, that the proceeding was unconstitutional, and seeking a postponement from the assigned hearing date. On January 19, 1989, the Forum responded to counsel's letter by advising that counsel follow the Forum's administrative rules regarding matters contained in counsel's letter.

8) On January 20, 1989, the Respondents Joseph, through counsel, filed the following:

a) Motion to Dismiss the Specific Charges, asserting that these Respondents, because of the nature of the remedy sought, were constitutionally entitled to a jury trial and that the Forum therefore lacked jurisdiction;

b) Motion to Make More Definite and Certain (in the event the Motion to Dismiss is not granted), asserting that the Specific Charges were too general to defend against, and asking that the Specific Charges be amended to allege the time and circumstances of each alleged incident deemed worthy of complaint so that said Respondents could adequately respond;

c) Motion for Postponement, based on the unavailability of Respondent's counsel due to a previously scheduled court appearance on February 28, 1989, the date set for the hearing herein.

9) On January 27, 1989, the Agency prepared and served on the Respondents Joseph and on the Respondent Dunkin', and each of them, Amended Specific Charges herein, alleging that the Respondents Joseph and Dunkin' subjected the Complainant to discriminatory treatment based on her female sex through sexual harassment, creating a hostile and intimidating work atmosphere, making the Complainant's continued employment intolerable, causing her to terminate

her employment, in violation of ORS 659.030(1)(a) and (1)(b).

10) With the Amended Specific Charges, the Forum served on the named Respondents, and each of them, the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

11) On January 30, 1989, the Hearings Referee ruled as follows on the pending motions of Respondents Joseph:

a) Denied the motion to dismiss, stating that "The statutes and rules upon which this contested case proceeding is based provide for redress of the Complainant's grievance through administrative procedures. ORS 659.010 to 659.110, ORS 183.413, *et seq*, OAR 839-03-000 to 839-03-095, OAR 839-07-500, 839-07-550 to 839-07-565, OAR 839-30-000 to 839-30-200. This scheme is presumptively valid, and the Forum declines to declare it otherwise."

b) Denied the motion to make more definite and certain, stating in part that the Agency's Specific Charges refer to repeated instances of the described conduct as occurring in a relatively short and recent time frame, that the Agency is not limited in the Specific Charges to the allegations of the Complainant's administrative complaint with the Civil Rights Division, so long as the Specific Charges are reasonably related to the ultimate offense alleged (citing *School District No. 1 v. Nilsen*, 269 Or 46, 534 P2d 1135 (1975)), and finding under OAR 839-30-070(3) "that the recitation of conduct is sufficiently specific to notify these Respondents that the nature of the conduct alleged is unwelcome and unwanted touching and related conduct because of the Complainant's sex, and is sufficiently specific to enable these Respondents to deny and/or explain. The Agency need not plead finite items of evidence in framing the charges; the Agency will have the burden at hearing of presenting evidence to support any fact or proposition alleged. ORS 183.450(2), OAR 839-30-105(10)."

c) Granted the motion for postponement, specifically finding "that Counsel for Respondents Joseph received trial assignment of another matter prior to receipt of the hearing date herein, such verified prior assignment constituting good cause under the rules of this Forum," and further ruled that the participants notify the Forum of their availability for hearing on certain specified future dates.

12) On February 2, 1989, the Forum received a letter from counsel for Respondent Dunkin' advising that a motion for summary judgment and, alternatively, an answer to the Amended Specific Charges would be filed prior to February 16, 1989.

13) On February 3, 1989, the Forum received a letter from counsel for Respondents Joseph advising of available dates for hearing. On February 13, 1989, the Forum received a letter from counsel for Respondent Dunkin' advising of available dates for hearing.

On February 14, 1989, the Hearings Referee reset the contested case hearing for April 5, 1989, and on February 16, 1989, the Forum issued an Amended Notice of Hearing for said date in the original Portland location.

14) On February 17, 1989, upon learning that an earlier attempt to serve the Forum with a motion to dismiss was unsuccessful, counsel for Respondent Dunkin' filed a motion to dismiss, based on Respondent Dunkin's status as franchisor and Respondents Josephs status as franchisee, and the resulting absence of any agency or master and servant relationship between Respondent Dunkin' and the Respondents Joseph.

15) On February 21, 1989, the Hearings Referee telephoned counsel for Respondent Dunkin', advised her of the technical default and suggested that she seek relief therefrom, and explained that a written ruling on that issue as well as on the motion to dismiss would be delayed by the Referee's commitment to another hearing in Baker beginning on February 22. On February 22, 1989, the Forum received Respondent Dunkin's answer to the Amended Specific Charges. On February 24, 1989, the Forum received from counsel a written request for relief from any default, accompanied by counsel's affidavit.

16) On March 8, 1989, the Hearings Referee ruled on the various issues surrounding the response of Respondent Dunkin' to the Amended Specific Charges issued January 27, 1989, as follows:

a) Found that said Respondent's failure to file a motion against the Amended Specific Charges within ten (10) days of January 27, 1989, (OAR 839-30-070) or to file an answer to the Amended Specific Charges within twenty (20) days of January 27, 1989, (OAR 839-30-060), constituted a default under OAR 839-30-185.

b) Granted relief from the default under OAR 839-30-190 based upon the affidavit of counsel and upon the files and records in this case, finding that the Respondent had made a good faith effort to comply with its duty to respond to the Amended Specific Charges, its failure to do so being due to a circumstance over which it had no control, and ruled that said Respondent's motion to dismiss be considered.

) Denied said Respondent's motion to dismiss, which was based upon said Respondent's status as franchisor and the Respondents Joseph's status as franchisee and independent contractor, holding that the issue of the status of Respondent Dunkin' as an employer chargeable with a violation in this case was one of fact to be explored at hearing, and could be pleaded as a defense in its answer to the Specific Charges.

17) Pursuant to OAR 839-30-071, on March 20, 1989, the Respondent Dunkin' timely filed its Summary of the Case, and on March 27, 1989, both the Agency and the Respondents Joseph timely filed, respectively, a Summary of the Case.

18) On March 29, 1989, Respondents Joseph through counsel objected to the introduction and use as substantive evidence of certain items contained in the Agency Case Summary. At hearing, the Hearings Referee reserved ruling on the admission of

the respective case summaries. A ruling on the March 29 objection and rulings on certain motions made at hearing are made preceding these Procedural Findings of Fact.

19) At the commencement of the hearing, the participants agreed to certain stipulations, which were stated into the record by the Hearings Referee, and which are noted appropriately in the Findings of Fact herein.

20) At the commencement of the hearing, counsel for the Respondents Joseph stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it. At the commencement of the hearing, counsel for the Respondent Dunkin' stated that she had read the Notice of Contested Case Rights and Procedures and had no questions about it.

21) Pursuant to ORS 183.415(7), the Respondents and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

22) The Proposed Order, which included as Exceptions Notice, was issued September 15, 1989. Exceptions were required to be filed by September 25, 1989. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) The Respondents George and Rosemarie Joseph, under the assumed business name of G & R Dunkin' Donuts, operated a donut shop at 5028 82nd Avenue, Portland, Oregon, utilizing the personal service of one or more employees and controlling the means by which such service was performed at times material herein.

2) The Respondent Dunkin' Donuts, Inc. is a foreign corporation which franchised Respondents Joseph's shop, and which utilized the personal service of one or more employees and controlled the means by which such service was performed at times material herein.

3) The franchise agreement between the Respondents Joseph and Respondent Dunkin' set up standards of quality of product, cleanliness, appearance, and use of Respondent Dunkin's name and logo. It disclaimed any agency relationship between the franchisee (the Josephs) and the franchisor (Dunkin').

4) Respondent Dunkin', through its representative, Jim Miller, periodically monitored the Respondents Joseph's baked goods, or product, as to quality, freshness, and availability. Miller also checked shop appearance, decor, lights, uniforms and cleanliness, courtesy to customers, and sales techniques. He could bring discrepancies to the operators' attention and make suggestions regarding solutions. He normally was on the premises about twice a month. The Josephs could accept or reject Miller's suggestions.

5) The Complainant Kerry Ross is a female who worked at G & R Dunkin' Donuts from December 1986 to June 27, 1987, at a wage of $3.35 per hour for hours worked.

6) The Complainant was hired at age 16 in December 1986 by Respondent George Joseph to work the counter. She made $3.35 an hour plus tips of $3.00 to $5.00 per shift. She worked generally "swing shift," from 3 p.m. to 11 p.m., during which she worked 3 p.m. to 7 p.m. accompanied by at least one other counter clerk, and from 7 p.m. to 11 p.m. by herself. Usually there was a male baker or a porter on the premises.

7) Her duties included waiting on customers and using the cash register from 3 p.m. to 7 p.m. From 7 p.m. to 11 p.m., she cleaned shelves and coffee makers and waited on customers. She also decorated donuts.

8) The Respondents Joseph were born in Trinidad, where they married. Both are of Lebanese ancestry. Respondent George Joseph states that part of his Lebanese culture includes hugging, touching, and kissing of family and close friends, and that such greeting and acknowledgments have no sexual connotation. He confirmed that he hugged or patted his employees, both male and female, in a friendly manner, and kissed some female employees on the cheek, but denied any sexual intent or result.

9) Employee witnesses described Respondent George Joseph as a friendly, touching, fun-loving person, who hugged both male and female employees and sometimes kissed females employees on the cheek. None were offended or regarded the familiarity as sexual in nature.

10) When the Complainant was working alone from 7 p.m. to 11 p.m., one or the other, or both, of the Respondents Joseph would be present during some part of the shift. Basically, most of the time they were there. Mr. Joseph was there more than Mrs. Joseph. According to the Complainant, he was there during about 3/4 of the Complainant's shifts, she about half.

11) Employees at G & R were hired by Respondents George and Rosemarie Joseph, and did not consider Jim Miller or anyone else from Dunkin' Donuts, Inc., to be their supervisor. Jim Miller did not give work instructions to G & R employees; he did not discuss the employees' work performance with them.

12) Respondents George and Rosemarie Joseph trained the shop employees, evaluated their performance, determined their hours, imposed any discipline, and generally supervised them.

13) Respondent Rosemarie Joseph corrected performance when mistakes were made in frosting donuts. Respondent Rosemarie Joseph usually was the one that gave correctional instructions to the counter staff, who were mostly female, and Respondent George Joseph generally supervised the bakers and porters, who were mostly male.

14) Respondent Rosemarie Joseph was a strong, demanding supervisor.

15) When a regular baker was unavailable, Respondent George Joseph worked the baker's shift, which might be either late night to early morning, or early morning to early afternoon.

16) The Respondents Joseph were in and out of the shop during the day. They were almost always present in the late afternoon in order to make a delivery. They usually arrived and left together. The shop was open 24 hours a day, every day of the year except Christmas.

17) At times material, the Respondents Joseph had two cars. One was a light truck used for delivery; the second was a sedan used by both Mr. and Mrs. Joseph for personal transportation. For this reason they often arrived at and left the shop together.

18) At times material, many of the employees at G & R socialized together outside work hours, and the Respondents Joseph sometimes socialized with some of their employees.

19) At times material, some of these employees dated among themselves, including dating employees or friends whom fellow employees had dated. Some of the same individuals, male and female, at various times and locations roomed or resided together.

20) At times material, rumor and gossip among and about co-workers at G & R was not uncommon. Some of the rumor and gossip regarded Respondent George Joseph.

21) The original administrative complaint filed with the Agency by the Complainant alleged that June 3, 1987, was the last day that the Complainant was sexually harassed by Respondent George Joseph and was the last day that the Complainant worked for the Respondents Joseph.

22) The Complainant decided to file a complaint with the Agency after talking the situation over with her parents. She made an appointment, which she had to re-schedule, and talked to a female Agency employee, who took information and mailed her the complaint for signature. She read and signed it, along with her mother.

23) The Complainant was not touched on the breast by Respondent George Joseph. She told the Agency case presenter prior to hearing that this particular allegation was in error.

24) During the Agency investigation of the Complainant's allegations, the Agency investigator interviewed witnesses, including the Complainant, and made notes of each interview, which were later reduced to a summary of relevant information. The final summary of the interview was not verbatim, but included those items the investigator believed important.

25) When investigator Rogers received a response to the original complaint to the effect that Respondent George Joseph was outside the state on June 3, 1987, he decided to interview the Complainant for clarification.

26) Rogers did not inform the Complainant, prior to interview, of the contents of the response received. He determined from that interview that the June 3 date was in error, and suggested upon completion of the interview that the complaint be amended. The Complainant agreed at that time that June 3 was the incorrect date, and that a date on or around June 30, 1987, was her last day of work for the Respondents Joseph. The Amended Complaint was filed as the result of the investigator's discovery of error in the original dates and acts alleged.

35) The interview with Investigator Rogers occurred on January 20, 1988. The Complainant told Rogers about three alleged incidents of sexual touching: one in January 1987, one in approximately March, and one in the week before she quit (June 1987). She told him (twice) that it was the March incident in which Respondent George Joseph told her to close her eyes and told her to "grow up." She told him that the final incident caused her to make mistakes in her work and that Respondent Rosemarie Joseph talked with her about her work performance. She stated she told Betsy Wittren for the first time about the sexual touching during the last week of June. She told Rogers that Respondent George Joseph had grabbed her breast shortly after the March kiss attempt, and she repeated that the "grow up" remark had occurred in March.

28) The Complainant didn't seek other employment until September 1987. In September she applied around Eastport Plaza and found a job at Kentucky Fried Chicken at $3.35 an hour within two weeks. The Complainant's employment by the Respondents Joseph at the donut shop was her first job, other than baby-sitting.

29) The Complainant never told Respondent Rosemarie Joseph about any touching by Respondent George Joseph. The Complainant never told Dunkin' representative Jim Miller about any touching by Respondent George Joseph.

30) The Complainant did not work for the Respondents Joseph on June 28, 1987, or any date thereafter. The Respondents were advised by telephone on June 28 that the Complainant was ill, and subsequently, that she quit.

31) The payroll records of the Respondents Joseph show that the Complainant worked from 3 p.m. to 7 p.m. on June 27, 1987, and that she did not work thereafter at G & R.

32) On June 27, 1987, Respondent George Joseph worked the day shift as baker, finishing around 2:30 or 3 p.m. The Complainant came to work at 3 p.m. Respondent Rosemarie Joseph gave the Complainant oral instructions, telling her what she needed to do to improve her performance, which Mrs. Joseph believed to have deteriorated.

33) While Mrs. Joseph was talking to the Complainant on June 27, Respondent George Joseph noted that the Complainant "rolled her eyes;" he told the Complainant not to make faces, and to "grow up."

34) Following the conversation with the Complainant, the Josephs left the shop for the day.

35) Co-workers who testified never saw the Complainant climb to reach items on the top shelf. Many discounted the necessity for such climbing, and the Respondents denied that it was necessary or that it was tolerated.

36) Male and female co-workers of the Complainant who testified had never heard any complaint from the Complainant, Betsy Wittren, Camille Laizans, or Kelly Ross about Respondent George Joseph touching them in a sexual manner.

37) Several female co-workers of the Complainant were hugged as a friend and kissed on the cheek by Respondent George Joseph; they inferred no sexual connotation from this contact.

38) The Complainant did not tell her sister, Kelly Ross, about her allegations until after the Complainant had filed the original complaint. Kelly Ross worked on June 27, 1987, but heard no comment from the Complainant at that time. Kelly Ross quit in late 1988

because she was uncomfortable due to the investigation of her sister's complaint against her employers and her perception that the employers were no longer friendly to her.

39) For security purposes, there were closed circuit television cameras on the premises, with a monitor in the office. One camera faced from the office through the storeroom toward the kitchen; it did not view the entire back room area. None of the employees were certain whether this camera was always on.

40) Respondent Rosemarie Joseph heard through another employee, Camille Laizans, that the Complainant had said she had quit because Mrs. Joseph was too demanding and too hard on her.

41) The witness Camille Laizans was available during the hearing.

42) Betsy Wittren asked Respondent George Joseph for "hugs" on a frequent basis.

43) Betsy Wittren was never assistant manager of the shop.

44) The Complainant's testimony, and her credibility, was seriously eroded by inconsistency and unreliable corroboration. She alleged originally, and to Investigator Rogers, and allegedly told Wittren, that Respondent George Joseph had touched or grabbed her breasts, but denied that at hearing. She stated she had informed her sister of his harassment just after she quit, but Kelly Ross testified (twice) that it was after the complaint was filed. The Complainant told the investigator that Respondent George Joseph told her to close her eyes and kiss him and to "grow up" in March, and testified at hearing to this happening on her last day of work. She denied any discussion with Respondent Rosemarie Joseph regarding work performance on her final day, but earlier told the investigator that she talked with Respondent Rosemarie Joseph on that day about the job. Later in the same interview she denied that Respondent Rosemarie Joseph had corrected her.

About the original complaint, she stated "I read it but I missed what it said." She stated she didn't note the dates, and she didn't know exactly how to explain that. She stated that the first complaint didn't really explain what actually happened; the original complaint recited that Respondent George Joseph touched the Complainant on the chest. She did not recall telling any Agency investigator that she had been touched on the breast by Respondent George Joseph, but said that when she was interviewed by Investigator Rogers, she told him everything that happened, and that she talked about the case with him. She acknowledged that she could have told him that Respondent George Joseph touched her on the breast.

The Complainant testified that she was grabbed on the buttocks on more than one occasion by the Respondent George Joseph when she was climbing on a table in the back room in order to reach something above it, that "on occasion he'd grab my butt and call me monkey, or bite my nose"; that he grabbed "my butt or around the waist, or that general area." She said she didn't know how to respond, and that Respondent George Joseph "bit" her on the nose with his lips between 10 and 15 times during her employment, usually holding her with his arm around her shoulder, but he never touched her in front of anybody. She said that Respondent Rosemarie Joseph was never on the premises when he engaged in such activity, and that she "wouldn't know how to tell Rose."

The Complainant was adamant in her assertions concerning Respondent George Joseph's activities on her final day of work. She was unable to remember the length of the shift she worked that day, but stated her belief that the incident happened about 7 or 8 p.m., half-way through her shift, and that she was scheduled for 3 to 11 p.m., working an 8-hour shift. She did not question the written record, which indicated her schedule as 3 to 7 p.m., but continued to assert that it happened, although it might have been 5 p.m. instead of 7 p.m.

Thus she was unable to establish to the Forum's satisfaction the time of day of the final incident, and she could not explain the obvious inconsistencies. She was extremely hesitant when cross-examined on this point. She denied any discussion with Respondent Rosemarie Joseph regarding work performance on her final day, but earlier told the investigator that she talked with Respondent Rosemarie on that day about the job, and later in the same interview denied that Respondent Rosemarie Joseph corrected her. The Forum has accordingly credited only those portions of her testimony which are verified by or not inconsistent with other credible evidence in the record.

45) Betsy Wittren testified that she was informed by the Complainant of the harassment the Complainant was experiencing in May 1987, a month before the Complainant stated she discussed it with Wittren. Wittren told the investigator that the Complainant lived with her off and on. She testified at hearing that the Complainant did not live with her. Although she failed to mention it to the investigator, she testified that she was assistant manager at the donut shop, which was denied by the employer and co-workers. She told the investigator that the Complainant told her about being grabbed on the breast by George Joseph in early June, just after it happened, and she testified at hearing that she learned of this before she terminated her own employment. The record indicates that she terminated her employment in April 1987. She testified that George Joseph subjected her to unwanted touching and hugging, but witnesses testified that she requested this attention. The Forum has accordingly credited only those portions of her testimony which are verified by or not inconsistent with other credible evidence in the record.

46) Kelly Ross testified to her knowledge of her sister's allegations, which she said her sister told her about after the filing in October 1987 of the original complaint herein. This was several months after the alleged events, and whatever she was told by the Complainant has no value as contemporaneous corroboration. Kelly Ross's actual observation was limited to one instance when she saw Respondent George Joseph hug her sister around the shoulder. She testified as to her own alleged experiences with Mr. Joseph, about which she told no one at the time. She could not state

when the one instance of his touching on the breast to which she actually testified may have occurred. She also testified to continued employment without protest until late 1988, over a year after her sister's filing, and stated her perception that the Josephs were treating her differently than before due to her sister's complaint. She gave that perception as the reason for her quitting, rather than any sexual advances toward her. The Forum has accordingly credited those portions of her testimony which are verified by or not inconsistent with other credible evidence in the record.

ULTIMATE FINDINGS OF FACT

1) At times material herein, the Respondents George and Rosemarie Joseph operated a donut shop in Portland, Oregon, under the assumed business name of G & R Dunkin' Donuts, and utilized the personal service of one or more employees and controlled the means by which such service was performed.

2) At times material herein, the Respondent Dunkin' Donuts, Inc. was a foreign corporation which franchised Respondents Joseph's shop, and which utilized the personal service of one or more employees and controlled the means by which such service was performed.

3) The Franchise agreement between the Respondents Joseph and Respondent Dunkin' set up standards of quality, freshness, and availability of product, cleanliness, appearance, and use of Respondent Dunkin's name and logo. It disclaimed any agency relationship between the franchisee (the Josephs) and the franchisor (Dunkin'). The Josephs could accept or reject Dunkin's suggestions about discrepancies so long as they did not misuse the Dunkin' name or logo, they adhered to the aforementioned standards, and they paid to Dunkin' a percentage of sales.

4) The Respondents Joseph were otherwise free to set their own policies and hire, train, supervise, discipline, pay, and assign work to their own staff, all of which they did at times material. The Respondent Dunkin' did not supervise or direct Mr. or Mrs. Joseph or any of the employees at G & R Dunkin' Donuts.

5) The Complainant Kerry Ross is a female who worked at G & R Dunkin' Donuts from December 1986 to June 27, 1987, at a wage of $3.35 per hour for hours worked. She waited on customers, used the cash register, cleaned shelves and coffee makers, and decorated donuts.

6) The Respondent George Joseph is a person who frequently touches and hugs friends, family and employees, regardless of their gender. He hugged most of his employees at G & R, and sometimes kissed the females on the cheek.

7) Respondent George Joseph's attentions to the Complainant did not go beyond friendly touching or hugging.

8) Respondent George Joseph's attentions to the Complainant did not caused her to resign.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in pertinent part:

> "(6) 'Employer' means any person * * * who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.
>
> "* * *
>
> "(11) 'Person' includes one or more individuals [or] * * * corporations * * *.
>
> "(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

At all times material herein the Respondents George Joseph and Rosemarie Joseph, dba G & R Dunkin' Donuts, were employers subject to the pertinent provisions of ORS 659.010 to 659.435 and of OAR 839-07-500 to 839-07-565. The Respondent Dunkin' Donuts, Inc., was not an employer as to the Respondents Joseph or as to those who worked for the Respondents Joseph.

2) ORS 659.040 provides, in pertinent part:

> "(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof. * * *"

OAR 839-07-515 provides:

> "A person who claims to be aggrieved under laws prohibiting discrimination because of sex may file a complaint with the [Civil Rights] Division. (See OAR 839-03-025 and ORS 659.040.)"

ORS 659.050 provides, in pertinent part:

> "(1) After the filing of any complaint under ORS 659.040 * * *, the commissioner shall cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents in the complaint the names of such persons may be added as respondents thereto. If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint and eliminate the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110 * * *."

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found.

3) ORS 659.030 provides, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

"(a) For an employer, because of an individual's * * * sex * * * to bar or discharge from employment such individual. * * *

"(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(2) Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

OAR 839-07-555 provides, in pertinent part:

"(1) An employer * * * is responsible for its acts * * * with respect to sexual harassment * * *."

The conduct of Respondent George Joseph in regard to the Complainant did not constitute sexual harassment in violation of ORS 659.030(1)(a) or (b).

OPINION

Respondent Dunkin' Motion to Dismiss

The mere assertion of a franchise is not sufficient to insulate the alleged franchisor. Whether the purported franchisee is in actuality an agent or servant ("employee") of the franchisor is generally determined by the alleged employer's right to control the alleged agent's operation. In this instance, while Dunkin' imposed certain standards regarding appearance, cleanliness, advertising, and product, it had no right to control the manner and means by which the operator accomplished the mutually desired result. The Josephs hired, fired, disciplined, supervised, assigned work hours and rates of pay, paid, withheld taxes, and the like. Dunkin' did not supervise the employees at the shop, nor did it supervise the Josephs or set their individual work hours. The Dunkin' corporation's representative observed, assisted, and offered suggestions to improve customer satisfaction and the operator's profit; the Josephs as operators could accept or reject the suggestions. No money flowed from Dunkin' to the Josephs as compensation; rather, the Josephs paid Dunkin' a percentage of sales for the use of the trade name and logo. All of this was within the franchise agreement, which contains a disclaimer of agency as to the franchisee.

ORS 659.010(6) defines an employer as any person (which includes corporations):

"who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees <u>reserving the right to control the means by which such service is or will be performed</u>." (Emphasis supplied.)

It is clear that Respondent Dunkin' was not an employer as to this complainant or her co-workers, and was not the employer under this statute of either of the Respondents Joseph. It is therefore unnecessary to rule on whether, under the rules of this Forum, the allegation of ownership in the administrative complaint operates in the nature of a "judicial admission" limiting the specific charges.

Liability of the Respondents Joseph

This Forum's standard for the Agency to prevail at contested case hearing is not that there be a mere suggestion that a violation might have occurred, or that there be some evidence in that direction; rather, the Agency's evidence must preponderate over conflicting or contrary evidence, based on the entire record of the proceeding. *In the Matter of Baker Truck Corral, Inc.*, 8 BOLI 118 (1989).

In this case, the Agency filed specific charges which alleged both generally and with some particularity acts on the part of George Joseph, as the Complainant's employer which, if proved, would constitute unlawful sexual harassment. The specific charges also alleged vicarious liability on the part of Dunkin' Donuts, Inc. for the alleged conduct. This question of master and servant and the meaning of the Dunkin'-Joseph franchise agreement is resolved herein on the basis of right to control.

Whether there were violations by Respondent Joseph of the type alleged turns on credibility. In order for the Agency to prevail, it must present credible evidence establishing that a violation of statute occurred. The Forum in the Findings of Fact has evaluated the testimony of some of the Agency witnesses. That which was inconsistent with other statements of the witness, or with other fact in the record, has been rejected. The resulting Findings simply do not support the charges.

It is not possible to conclude, based on a preponderance of the evidence, that any one of the Complainant's accusations has been proved as to time, place, and occurrence. The Complainant alleged, and then denied, that Respondent George Joseph touched her on the breast. She vacillated on the dates of occurrences and on the time of day of the alleged final incident. For instance, she testified that Respondent George Joseph previously called her into the back and asked her to kiss him, and that on the last day she worked "he took me in the back and he told me to kiss him and I said no and he told me to grow up," to close her eyes and trust him. She twice told the investigator that it was March that Mr. Joseph told her to close her eyes and told her to "grow up." She told him that Mr. Joseph had grabbed her breast shortly after the March kiss attempt, and she repeated that the "grow up" remark had occurred in March.

The original administrative complaint alleged June 3, 1987, as the last day that the Complainant worked for the Respondents Joseph and the last day that she was sexually harassed by

Respondent George Joseph. She said she read and signed it, and that "I read it but I missed what it said." She couldn't explain that she didn't note the dates, or attempt to correct the inaccurate allegation about being touched on the breast.

The Complainant testified that she was scheduled for 3 p.m. to 11 p.m. on her last day, and that the incident happened about 7 or 8 p.m., about halfway through her shift. She was unable to remember with certainty the length of the shift she worked, stating that it might have been 5 p.m. instead of 7 p.m. that the incident happened, but she was adamant in her assertions concerning Respondent George Joseph's activities. She did not question the written record, but stated that the incident happened and then repeated that she worked an 8-hour shift.

The Complainant denied a conversation on her final day with Mrs. Joseph concerning her work performance, but three witnesses testified to Rosemarie Joseph telling her that she needed to do to improve her performance.

Her corroborative witnesses did not shore up these weak points in that her own testimony varied with that of Wittren and Kelly Ross as to when she told each of them what had happened, and even as to what she told them. She stated she told Betsy Wittren for the first time about the sexual touching during the last week of June, but Wittren testified that she was informed by the Complainant of the harassment in May, a month before. Wittren told the investigator that the Complainant told her about being grabbed on the breast by George Joseph in early June, just after it happened, but she testified at hearing that she learned of this before she quit her employment in April 1987. In either event, the Complainant testified that this touching never happened at all, discrediting both her own credibility and that of Wittren.

The Complainant testified that some of the touching occurred when she climbed on a table or counter. Witness testimony and photographs did not confirm the necessity for nor the likelihood of the climbing.

Thus, it was not proved that Respondent George Joseph, either once or more than once, touched or otherwise harassed this Complainant in a sexual manner. It follows that the alleged unlawful touching or harassment could not form the basis for the constructive discharge alleged.

ORDER

NOW, THEREFORE, none of the Respondents having been found to have engaged in the unlawful employment practice charged, the Specific Charges and the Complaint against the Respondents George Joseph and Rosemarie Joseph, doing business as G & R Dunkin' Donuts, as well as the Specific Charges against Respondent Dunkin' Donuts, Inc., are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

KIRSTEN CORPORATION,

dba Columbia American Plating; Lakea Corporation, dba Columbia American Plating; Leif H. Underdahl; Marilyn Underdahl; Larry Anson; and Annette Anson, Respondents.

Case Number 48-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued January 17, 1990.

SYNOPSIS

The Commissioner granted summary judgment to Respondents, holding that the Agency failed to follow OAR 839-03-065 (regarding Civil Rights Division investigations) when it reopened Complainant's case after it had issued an Administrative Determination finding no substantial evidence of unlawful discrimination, denied Complainant's request for reconsideration, and closed the case. Accordingly, the Commissioner held that the rule must be followed, the Administrative Determination was final, and the case was closed. OAR 839-03-000, 839-03-065.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 14, 1989, in Room 311 of the Portland State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. The hearing was for the purpose of oral argument on Respondents' motion for summary judgment. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Linda Lohr, an employee of the Agency. Scott E. Swentek (hereinafter Complainant) was present throughout the hearing. Kirsten Corporation, Lakea Corporation, Leif Underdahl, Marilyn Underdahl, Larry Anson, and Annette Anson (hereinafter Respondents) were represented by Scott T. Cliff, Attorney at Law.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On August 22, 1986, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent* discriminated against him because he reported unsafe working conditions at Respondent's place of employment, in that, on July 30, 1986, Respondent terminated Complainant.

2) After investigation and review, on November 21, 1986, the Agency issued an Administrative Determination

* Many of the documents refer to "Respondent" in the singular. Those references were to Columbia American Plating, which at the time of the complaint was a business name for Kirsten Corporation. Unless otherwise noted, references in this order to "Respondent" refer to Columbia American Plating as a business name for Kirsten Corporation.

finding no substantial evidence of an unlawful employment practice, under ORS 654.062, by Respondent.

3) On November 21, 1986, the Agency notified Complainant, Respondent, and Respondent's attorney that it found no substantial evidence of discrimination, the complaint was closed, and

> "[t]his is the final action that this agency will take subject to OAR 839-03-065(9) (see enclosed information). The complainant does have the right to take this complaint to Circuit Court and is being provided with a Private Right of Action Notice explaining that right."

Complainant was given a Notice of Private Right of Action that explained such rights.

4) On November 28, 1986, Complainant sent the Agency a letter challenging the Administrative Determination in accordance with OAR 839-03-065(9). He cited numerous errors and made corrections to the Findings of Facts listed in the Administrative Determination.

5) On January 12, 1987, the agency sent Complainant a letter acknowledging his request for reconsideration of the Administrative Determination. The Agency wrote that the

> "Administrative Rule allowing reconsideration of Division Administrative Determinations (OAR 839-03-065(9)) provides that a reconsideration request identify unarguable error or omission which, if corrected, would reverse the Determination. We have considered your request by this standard. * * * [Although the Administrative Determination was amended to clarify one Finding of Fact, the] Division does not agree that the Determination contains unarguable error or omission that would change the outcome. Reconsideration is denied, and the file remains closed."

In the amended determination the division found no substantial evidence of unlawful employment discrimination based upon opposition to safety hazards under ORS 654.062. The Agency reminded Complainant of the Private Right of Action Notice and suggested that he consult an attorney.

6) On January 14, 1987, Complainant requested to view and/or copy the closed case file. The Agency provided him with a copy. On January 19, 1987, Complainant wrote the Agency a letter in which he noted factual inaccuracies in the amended determination and criticized the Agency's handling of his complaint. He wrote a similar letter to the Commissioner, and a letter to the Governor, asserting that the Agency had "no set guidelines used in investigating" cases like his.

7) On July 10, 1987, the Agency wrote to Complainant that it had reviewed his case and "the Civil Rights Division determines that your case should be reopened for further investigation." Also on July 10, 1987, the Agency notified Respondents that Complainant had appealed the division's finding of no substantial evidence, and that after review

> "the agency has determined that Complainant has raised questions concerning the adequacy of facts in evidence to the extent that we are reopening the case for further investigation."

8) On December 23, 1987, Respondent's attorney wrote to the Agency challenging its authority to continue its proceedings in this case, since the division had failed to issue a final Administrative Determination within the one-year limitation period provided in ORS 659.095.

9) On June 29, 1988, Complainant wrote to the Agency requesting some response to his inquiries about his case. Earlier he had been informed by the Agency that there was some question "as to the legality of the department proceeding in this case."

10) On December 14, 1988, Raleigh Lewis, Administrator of the Civil Rights Division, wrote to Respondent's attorney that this case

> "was reopened for further investigation on July 30, 1987, based on omissions in the Administrative Determination. After further investigation, the Division has concluded that these errors or omissions, if corrected, would reverse the Administrative Determination. We are mindful of your position concerning the authority of the Division to reopen the investigation in this case, but disagree with it. The investigation was reopened and notice given before the limitation period had run. Consequently, the Division reassumed jurisdiction in a timely fashion and had the authority to investigate Complainant's allegations of error or omission [in] the Administrative Determination previously issued, and to make a reliable assessment concerning them. This the Division has done."

Enclosed with the letter was a copy of a "Notice of Amended Determination (Amendment Two)," which reversed the previous determinations, finding substantial evidence of a violation of ORS 654.062(5)(a). Respondent's attorney was advised that he would be contacted by an investigative supervisor to attempt to conciliate the case.

11) At no time between November 21, 1986, and December 14, 1988, did the Agency notify Respondents that Complainant had identified in writing errors or omissions in the first Administrative Determination, nor did the Agency mail to Respondents a copy of Complainant's letter identifying errors or omissions.

12) On June 30, 1989, the Agency prepared and duly served on Respondents Specific Charges that alleged that Respondents had discharged Complainant from employment because Complainant opposed an unsafe practice. The Specific Charges alleged that Respondent's action violated ORS 654.062(5)(a).

13) With the Specific Charges, the Forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

14) On July 14, 1989, the Hearings Unit received a motion from Respondent Leif Underdahl to dismiss from the case Lakea Corporation, Larry Anson, and Annette Anson on the ground that they "were not a party to or a continuation of the company that is a party to the allegations in the complaint." His motion was denied -- pursuant to ORS 9.320, 9.160, and OAR 839-30-025(7) and (15) -- because there was no showing that he was an attorney representing either Kirsten Corporation or Lakea Corporation, or that he represented the Ansons.

15) On July 19, 1989, the Hearings Referee granted an extension of time to Lakea Corporation and the Ansons to file their answers.

16) On July 20, 1989, the Hearings Unit received an answer from Respondents Larry Anson and Annette Anson in which they denied that they were successors to Kirsten Corporation, that they committed any unlawful employment practice, and that they were parties to any of the particular allegations made in the Specific Charges.

17) On July 20, 1989, the Hearings Unit received a motion from Larry Anson and Annette Anson to be dismissed from the case because they did not know Complainant and they did not own or know of Lakea Corporation or Columbia American Plating Company at the time of the alleged unlawful employment practice. The Agency opposed the motion on the basis that the Ansons and Lakea Corporation were successors to Kirsten Corporation, dba Columbia American Plating. The motion was denied because there was no evidence to show that the Ansons were not successors.

18) On July 21, 1989, Respondents Kirsten Corporation, Leif Underdahl, and Marilyn Underdahl filed an answer in which they denied the allegation mentioned above in the Specific Charges and stated numerous affirmative defenses.

19) On July 28, 1989, Lakea Corporation filed an answer in which it denied the allegation mentioned above in the Specific Charges because it was not a successor to the Kirsten Corporation and stated numerous affirmative defenses.

20) On July 28, 1989, Larry Anson and Annette Anson filed an amended answer in which they denied the allegation mentioned above in the Specific Charges because they were not successors to the Kirsten Corporation and stated numerous affirmative defenses.

21) On August 7, 1989, the participants were notified that the Hearings Referee assigned to the case had been changed.

22) On August 23, 1989, the Hearings Unit received from Respondents a motion to postpone the hearing in order to file a motion for summary judgment regarding jurisdictional and procedural issues. The Agency joined in Respondents' request. The motion was granted, because the issues raised in the motion could be dispositive of the case. The participants were notified that the Hearings Referee designated to hear this case was again changed, with the originally assigned Hearings Referee being reassigned.

23) On August 25, 1989, an Amended Notice of Hearing was issued to Respondents and the Agency.

24) On September 5, 1989, Respondents filed a motion for summary judgment with supporting affidavits and documents.

25) On November 2, 1989, a telephone conference took place among Judy Bracanovich for the Agency, Scott Cliff for Respondents, and the Hearings Referee. The Hearings Referee decided that only oral argument on the motion for summary judgment would occur on the date scheduled for hearing, and that additional hearing dates would be scheduled if necessary.

26) On November 6, 1989, the Agency filed its written response to Respondents' motion for summary judgment.

27) At the commencement of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

28) Pursuant to OAR 839-30-155, the Hearings Referee requested post-hearing briefs from Respondents and the Agency. The record of the hearing was left open until November 27, 1989, for those briefs. After an extension of time, Respondents submitted a timely brief. The documents relating to the submission of post-hearing briefs and Respondents' brief have been marked and are hereby received into the record as administrative exhibits.

29) The Proposed Order, which included an Exceptions Notice, was issued December 15, 1989. Exceptions were required to be filed by December 26, 1989. No exceptions were received.

FINDINGS OF FACTS -- THE MERITS

1) At all times material herein, Respondent Columbia American Plating was an assumed business name for a fabricated metal products business owned and operated by Kirsten Corporation, an Oregon corporation, and was an employer in the State of Oregon utilizing the personal services of one or more employees subject to the provisions of ORS 659.010 to 659.435, ORS 654.001 to 654.295 and ORS 654.750 to 654.780. Leif H. Underdahl and Marilyn Underdahl are the principal shareholders and corporate officers (president and secretary, respectively) of Kirsten Corporation. Columbia American Plating is now the assumed business name of Lakea Corporation, effective April 29, 1987. Larry Anson and Annette Anson are the principal shareholders and corporate officers (president and secretary, respectively) of Lakea Corporation.

2) Complainant was employed by Respondent as a part-time chemist between April 5, 1985, and July 30, 1986.

3) Complainant advised Respondent of safety measures Complainant believed Respondent should implement in order to alleviate hazards in the work place.

4) Complainant reported the hazardous working conditions to the Accident Prevention Division (APD) and Department of Environmental Quality (DEQ).

5) APD conducted an inspection of Respondent's premises.

6) Respondent became aware during the course of the APD investigation that Complainant was the

employee who filed a safety complaint with APD.

7) On or about June 22, 1986, Respondent placed an advertisement in the Sunday Oregonian for a part-time chemist.

8) On or about July 30, 1986, Respondent terminated Complainant.

ULTIMATE FINDINGS OF FACTS

1) At all times material herein, Respondents Kirsten Corporation, Leif Underdahl, and Marilyn Underdahl were employers who used the personal services of one or more employees in the State of Oregon.

2) Complainant was employed by Respondents Kirsten Corporation, Leif Underdahl, and Marilyn Underdahl.

3) On August 22, 1986, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him because he reported unsafe working conditions at Respondent's place of employment, in that, on July 30, 1986, Respondent terminated him.

4) After investigation and review, on November 21, 1986, the Agency issued an Administrative Determination finding no substantial evidence of an unlawful employment practice based upon opposition to safety hazards under ORS 654.062. The Agency notified Complainant of the private right of action.

5) Within 10 days of when the Administrative Determination was issued, Complainant identified by letter errors he perceived in the Administrative Determination.

6) The Agency reviewed Complainant's letter and decided that the Administrative Determination did not include a clear and unarguable error or omission which, if corrected, would reverse the Administrative Determination. The determination was amended to clarify a Finding of Fact, and the division found no substantial evidence of unlawful employment discrimination based upon opposition to safety hazards under ORS 654.062. The case file remained closed. On January 12, 1987, the Agency so notified Complainant and reminded him of the Private Right of Action Notice and suggested that he consult an attorney.

7) The Administrative Determination, as amended, was final.

CONCLUSIONS OF LAW

1) ORS 654.005 provides, in pertinent part:

> "(5) 'Employer' means any person who has one or more employees * * *.
>
> "(7) 'Person' means one or more individuals, * * * [or] corporations * * *."

ORS 659.010 provides, in pertinent part:

> "(6) 'Employer' means any person * * * who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.
>
> "(11) 'Person' includes one or more individuals [or] * * * corporations * * *.
>
> "(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1)."

ORS 659.050(1) provides, in pertinent part:

> "After the filing of any complaint under ORS 659.040 or 659.045, the commissioner may cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents in the complaint the names of such persons may be added as respondents thereto. * * *"

At all times material herein the Respondents Kirsten Corporation, Leif Underdahl, and Marilyn Underdahl were employers subject to the provisions of ORS 659.010 to 659.110. The Respondents Lakea Corporation, Larry Anson, and Annette Anson were properly added as Respondents and are subject to the provisions of ORS 659.010 to 659.110.

2) ORS 654.062(5)(b) provides, in pertinent part:

> "Any employee * * * who believes that the employee has been barred or discharged from employment or otherwise discriminated against in compensation, or in terms, conditions or privileges of employment, by any person in violation of this subsection may * * * file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, polices and remedies established by the ORS 659.010 to 659.110 and the polices established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f). * * *"

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein related to the alleged violation of ORS 654.062.

3) OAR 839-03-065 provides, in pertinent part:

> "(8) If the Division finds no substantial evidence of unlawful discrimination, the division will close the complaint and notify the Complainant and Respondent of the closure and notify the Complainant of the right to file a civil suit, if such a right exists. * * *
>
> "(9) The Administrative Determination is final except in the following rare circumstances:
>
> "(a) The Administrative Determination includes a clear and unarguable error or omission which, if corrected, would reverse the Administrative Determination. The Complainant or the Respondent must identify this error or omission

to the Administrator in writing within ten (10) working days of the mailing of the Administrative Determination * * *; or

"(b) The Complainant or Respondent brings forth new evidence within the scope of the complaint which, if considered, would reverse the Administrative Determination. * * *;

"(c) Exceptions (a) and (b) will be construed very narrowly;

"(d) If the conditions in (a) and/or (b) of this section have been met, the Division will notify the Complainant or Respondent who would be adversely affected by the reversal of the Administrative Determination. The division will mail such notice and a copy of the exceptions within thirty (30) days of the receipt of exceptions (a) and/or (b) of this section. The adversely affected party may file a written rebuttal to the exceptions within ten (10) days of the date of such notice. The Administrator will notify the Complainant and Respondent of the final decision on the reversal of the Administrative Determination.

"(e) If the conditions in (a) and/or (b) of this section have not been met, the Division will so notify the party who requested exception under (a) and/or (b) of this section."

The Administrative Determination issued on November 21, 1986, became final (as amended) on January 12, 1987, when the Agency notified Complainant that the conditions of section (9)(a) had not been met, that is, when the Agency notified Complainant that the

"Division does not agree that the Determination contains unarguable error or omission that would change the outcome. Reconsideration is denied, and the file remains closed."

The Agency violated OAR 839-03-065 by reopening the case and reversing the Administrative Determination after January 12, 1987.

OPINION

Respondents raised two issues in their motion for summary judgment. First, they claimed that, in violation of OAR 839-03-065, the Civil Rights Division reopened its investigation of this case after issuing an Administrative Determination. Second, they claimed that the division lost jurisdiction over this matter, pursuant to ORS 659.095, one year after the filing of the complaint, since a final Administrative Determination had not been issued within that time. Because the Forum has found that the Administrative Determination was final on January 12, 1987, and the Agency violated its rule (OAR 839-03-065) by reopening the case after that date, the second issue raised by Respondents is moot.

The Facts

The facts are not in dispute. The Agency issued an Administrative Determination in November 1986 and found no substantial evidence of unlawful discrimination. The Agency properly closed the complaint, notified the Complainant and the Respondent of the closure, and notified the Complainant of the right to file a civil suit. *See* OAR 839-03-065(8). Within 10 days of the mailing of the Administrative Determination the Complainant identified in writing errors in the Administrative Determination. *See* OAR 839-03-065(9)(a). The Agency made a decision that the errors Complainant identified did not amount to "clear and unarguable error[s] or omission[s] which, if corrected, would reverse the Administrative Determination." The Agency notified the Complainant on January 12, 1987, that the conditions of OAR 839-03-065(9)(a) had not been met and that the file remained closed, reminded him of the right to file a civil suit, and advised him to consult an attorney. Thereafter, on January 19, 1987, the Complainant again wrote to the Agency to complain about errors in the amended Administrative Determination. On July 10, 1987, the Agency notified the Complainant and the Respondent that the case was reopened because "Complainant has raised questions concerning the adequacy of the facts in evidence * * *." The Agency never mailed to Respondent a copy of the exceptions raised by Complainant. On December 14 1988, the Agency issued an Administrative Determination (Second Amended), which reversed the original determination and found substantial evidence of unlawful discrimination.

The Rule – OAR 839-03-065

OAR 839-03-065 is clear. "The Administrative Determination is final except in" two "rare circumstances." (Emphasis added.) OAR 839-03-065(9). First, Complainant or Respondent must identify a clear and unarguable error or omission in the Administrative Determination which, if corrected, would reverse the determination. OAR 839-03-065(9)(a). Second, Complainant or Respondent must bring forth new evidence which, if considered, would reverse the determination. OAR 839-03-065(9)(b). Those two exceptions "will be construed very narrowly." OAR 839-03-065(9)(c). If neither of the exceptions is met, the division so notifies the Complainant or Respondent who requested the exception. OAR 839-03-065(9)(e). Thus, if neither exception occurs, the Administrative Determination is final. As stated in Conclusion of Law number three, the Administrative Determination issued on November 21, 1986, became final (as amended) on January 12, 1987, when the Agency notified Complainant that the conditions of section (9)(a) had not been met, that is, when the Agency notified Complainant that the

"Division does not agree that the Determination contains unarguable error or omission that would change the outcome. Reconsideration is denied, and the file remains closed."

The Agency violated OAR 839-03-065 by reopening the case and reversing the Administrative Determination after January 12, 1987.

The rule provides a reconsideration process for Administrative Determinations, and it states the results of that process: either (1) the provisions of OAR 839-03-065(9)(d) are followed when one of the "rare circumstances" has been met, and then the Complainant and the Respondent are notified by the Agency of the final decision on the reversal of the Administrative Determination; or (2) the process stops when the "rare circumstances" have not

been met, and the party who requested reconsideration is so notified. OAR 839-03-065(9)(e). In the latter case, neither exception applies and therefore the "Administrative Determination is final." OAR 839-03-065(9). Although an Amended Determination was issued on January 12, 1987, the amendment was a clarification of a Finding of Fact in the original determination issued on November 21, 1986. The fact that an amended determination was issued – one that did not substantively change the original – does not recycle the rule's reconsideration process. In addition to providing for the reconsideration process, the rule also provides for finality of the Administrative Determination.

Such finality is important to complainants, respondents, and the Agency. When the Agency has found no substantial evidence of unlawful discrimination and reconsideration has been denied, complainants need to know that the determination is final, and they must decide about filing a suit in civil court. Respondents need to know that such a determination is final in order to remove the threat of liability and the need to preserve evidence, at least if no civil suit is filed. The Agency needs to know that, once the reconsideration process has run its course, a closed case will remain closed and the Agency's resources can be directed to active complaints.

The Agency argued at hearing that the Commissioner has the authority to reopen cases independently from OAR 839-03-065, citing OAR 839-03-000 and an Attorney General's advisory opinion, 40 Op. Attorney General 64 (1979).

OAR 839-03-000 provides:

> "(1) These rules will govern the complaint procedures of the Civil Rights Division for all complaints filed with the Division * * *. These procedures govern the Division's complaint process from the Complainant's initial inquiry until the Division closes the complaint or refers it to the Bureau's counsel for contested case hearing. These rules will be liberally construed by the Commissioner to permit the Division to discharge the Bureau's statutory functions and to secure just and speedy determinations of the merits of all complaints received by the Division.
>
> "(2) In any matter that arises which is not governed by these rules the Commissioner will exercise his/her discretion under the law. * * *"

The Attorney General's opinion notes that the Commissioner is given great discretion in handling complaints, citing ORS 659.050.

The Agency's argument, which focused on the July 10, 1987, case reopening, was not supported by the facts that showed that the division, not the Commissioner, reopened the case "to investigate Complainant's allegations of error or omission [in] the Administrative Determination previously issued, and to make a reliable assessment concerning them." "[T]he Division has concluded that these errors or omissions, if corrected, would reverse the Administrative Determination." Letter from Raleigh Lewis, Administrator of the Civil Rights Division, to Respondents' attorney, dated December 14, 1988. The reopening of the case was

done by the division, quite apparently under the provisions of OAR 839-03-065. This was not a case where the Commissioner was exercising her discretion, under OAR 839-03-000(2), in a matter "which is not governed by these rules."

Remand to Follow the Rule

An agency which is vested with discretion by statute may limit its own discretion in its rules. Once it has limited its discretion, the agency "may be compelled, * * * to act in accordance with its self-imposed limitations." *Wyers v. Dressler,* 42 Or App 799, 807-08, 601 P2d 1269, 1273 (1979) *rev den* 288 Or 527 (1980). The Oregon Supreme Court has said,

> "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute." *Bronson v. Moonen,* 270 Or 469, 476-77, 528 P2d 82 (1974).

The Oregon Court of Appeals has said regarding Bureau of Labor and Industries' rules that,

> "[r]ules prescribing methods of procedure of an administrative board or commission have the effect of law, are binding on the board or commission and must be followed by it so long as they are in effect." *Williams v. Joyce,* 4 Or App 482, 506, 479 P2d 513, 524, 40 ALR 3d 1272, *rev den* (1971).

Under the facts of this case, OAR 839-03-065 states that an Administrative Determination is final when the exceptions are not met.

The Agency did not follow its own rule when it reopened Complainant's case in July 1987. Where agencies have failed to follow their own rules, the courts have remanded the cases to the agencies with directions that they follow those rules. *See Fors v. Motor Vehicles Division,* 47 Or App 447, 615 P2d 331 (1980); *Fadeley v. Oregon Government Ethics Commission,* 30 Or App 795, 568 P2d 687, 690-91 (1977).

In this case, to follow the rule means to treat as final the Administrative Determination (as amended) issued in November 1986. That determination says the Agency found no substantial evidence of unlawful discrimination. The case is closed.

ORDER

NOW, THEREFORE, Respondents' motion for summary judgment is granted. The specific charges and the complaint against the Respondent in this matter are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
XAVIER CARBAJAL,
dba Oregon Farm Workers,
and Pablo Carbajal, Sr.,
Respondents.

Case Numbers 44-89 and 46-89
Final Order of the Commissioner
Mary Wendy Roberts
Issued February 22, 1990.

SYNOPSIS

Pablo Carbajal acted as a farm labor contractor without a license by operating five farm labor camps, where he furnished lodging to farm workers, and by recruiting, soliciting, and employing workers. Xavier Carbajal, a licensed farm labor contractor, assisted Pablo Carbajal to act in violation of the law. Xavier Carbajal failed to post a notice of his compliance with the statutory requirement to furnish a surety bond. Both Respondents repeatedly failed to give workers written statements regarding their employment and their rights and remedies. The Commissioner found that Xavier Carbajal's character, competence, and reliability made him unfit to act as a farm labor contractor, and denied him a farm labor contractor license. The Commissioner assessed Pablo Carbajal a civil penalty of $15,500. ORS 658.410(1), 658.415(1) and (15), 658.440(1)(f) and (2)(e), 658.453(1); OAR 839-15-130(8), 839-15-145(1), 839-15-450(1) and (4), 839-15-505(2), 839-15-512, 839-15-520.

The above-entitled contested cases came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 11 and 12, 1989, in the conference room of the Bureau of Labor and Industries office, 3865 Wolverine Street NE, Suite E-1, Salem, Oregon. Lee Bercot, Hearings Coordinator for the Wage and Hour Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Xavier Carbajal (hereinafter Contractor Xavier) and Pablo Carbajal, Sr. (hereinafter Contractor Pablo) were present throughout the hearing. Neither contractor was represented by counsel. Each contractor, on occasion, questioned the witnesses, called witnesses on his own behalf, and argued his respective position. Although permitted to do so, neither contractor filed a Summary of the Case.

The Agency called as witnesses the following (in alphabetical order): Fran Birko, Industrial Hygienist, Accident Prevention Division (APD) of the Workers' Compensation Department; Maria Cazares, Field Representative for the Agency; Mike Culver, Code Enforcement Officer, City of Woodburn; Karen DeSanno, Licensing Unit of the Agency; Eunice Goetz, Executive Director, Oregon Commission on Hispanic Affairs; Stephen Gossman, Compliance Officer, APD; Stephen Jackson, reporter, Eugene Register-Guard; John Murray, owner, Star Apartments; Raul Pena, Compliance Specialist for the Agency; William Pick, Compliance Specialist, Farm Labor Unit of the Agency; and Corbett Stengel, Assistant Industrial Hygienist, APD.

Contractor Xavier and Contractor Pablo testified and cross-examined the Agency witnesses. The contractors called Artemio Fregoso as a witness. Dorcus Herr, an employee of the Agency, served as an interpreter. Pete Collazo served as an interpreter.

Following the hearing of testimony, both the Agency and the Contractors submitted additional documents requested by the Hearings Referee. Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 7, 1989, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor License" to Contractor Xavier. The notice informed him that the Agency intended to deny his application for a farm labor contractor's license. The notice cited the following basis for the denial:

> "Assisting an Unlicensed Person to Act in Violation of ORS 658.405 to 658.485, The Farm Labor Contractors Statute."

The notice was served on Contractor Xavier on April 13, 1989.

2) On April 7, 1989, the Agency issued a "Notice of Intent to Assess Civil Penalty" to Contractor Pablo. The notice cited the following bases for the assessment:

> "1. Acting As A Farm Labor Contractor Without A Farm Labor Contractor's License. * * * in violation of ORS 658.410(1) and 658.415(1). * * * Civil Penalty of $1,000.00 for each violation or $2,000.00.
>
> "2. Failure to Conspicuously Post A Notice of Surety Bond. * * * in violation of ORS 658.415(15). * * * Civil Penalty of $1,000.00 for each violation or $2,000.00.
>
> "3. Failure To Furnish Written Statements To Workers Describing Working Conditions and Workers' Rights and Remedies Under Law: Fourteen (14) Violations. * * * in violation of ORS 658.440 (1)(f)(A) through (I). * * * Civil Penalty of $500.00 for each violation or $7,000.00."

On around May 22, 1989, Contractor Pablo agreed to waive formal service of the notice through the sheriff and accepted service of the notice through Contractor Xavier.

3) By a letter dated April 26, 1989, Contractor Xavier answered the Notice of Proposed Denial of Farm Labor Contractor License with a general denial, and he requested a hearing on the Agency's intended action.

4) On June 5, 1989, the Agency received Contractor Pablo's answer to the Notice of Intent to Assess Civil Penalty. In his answer, he denied that he was a contractor because he worked for his son, Xavier Carbajal.

He requested a hearing on the Agency's intended action.

5) On May 19, 1989, the Agency requested a hearing date for the matter concerning Contractor Xavier, case number 44-89. On May 25, 1989, the Forum issued to Contractor Xavier and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearing Referee. With the hearing notice, the Forum sent to Contractor Xavier a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413 and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

6) On June 9, 1989, the Agency requested a hearing date for the matter concerning Contractor Pablo, case number 46-89, and moved for an order consolidating that matter with case number 44-89. On June 12, 1989, the Forum granted the Agency's motion and issued to Contractor Pablo and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearing Referee. With the hearing notice, the Forum sent to Contractor Pablo a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413 and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

7) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case, including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Contractors Xavier and Pablo did not submit a Summary of the Case.

8) On July 6, 1989, the Agency filed a motion to amend its Notice of Proposed Denial of a Farm Labor Contractor License, case number 44-89, to add two new allegations as grounds for the proposed denial of Contractor Xavier's license:

> "2. Failure to Conspicuously Post a Notice of Surety Bond. * * * in violation of ORS 658.415(15).
>
> "3. Failure to Furnish Written Statements to Workers Describing Working Conditions And Workers' Rights and Remedies Under Law: Fourteen (14) Violations. * * * in violation of ORS 658.440(1)(f)(A) through (l)."

9) At the start of the hearing on July 11, 1989, the Hearings Referee found that the Agency's July 6 motion was of questionable timeliness, and held a ruling on the motion in abeyance. At the end of the hearing, the Hearings Referee allowed the Agency to modify its motion to a motion to conform pleadings to the evidence.

10) At the start of the hearing, the Hearings Referee asked each contractor whether he had received the Notice of Contested Case Rights and Procedures. Both Contractors received the notice.

11) At the start of the hearing, Contractor Xavier requested a postponement of the hearing for two weeks in order to hire an attorney. He had chosen not hire an attorney before the hearing because he believed that his case would settle. The Agency opposed the postponement based on OAR 839-30-057(3) which states that,

> "Once the contested case hearing has begun, no party will be allowed a recess to obtain the services of counsel."

In addition, the Contractors had been orally advised by the Agency several times, beginning as early as May 1989, to obtain the assistance of counsel; the Agency also advised Contractor Xavier by letter dated June 23, 1989, to consult an attorney. Contractors had adequate notice of the hearing and adequate opportunity to consult an attorney. Contractors were not misled by the Agency into not seeking the assistance of counsel. The Hearings Referee denied the requested postponement and ruled that the hearing would proceed as scheduled.

12) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) During the hearing, the Agency made a motion to amend it pleadings, the Notice of Proposed Denial of a Farm Labor Contractor License (Case number 44-89), and the Notice of Intent to Assess Civil Penalty (Case number 46-89) to conform to the evidence and to reflect issues presented at the hearing. The motion was made pursuant to OAR 839-30-075. The Hearings Referee granted the motion because the amendments reflected issues and evidence which had been previously introduced into the record without objection from the Contractors. On July 19, 1989, the Agency filed its amended pleadings in both cases, numbers 44-89 and 46-89, to conform the pleadings to the evidence introduced at hearing. Regarding case number 44-89 (Contractor Xavier), the conformed pleadings read:

> "1. Assisting An Unlicensed Person to Act In Violation of ORS 658.405 to 658.485, The Farm Labor Contractor Statute: Seven (7) Violations. * * * in violation of ORS 658.440(2)(e).
>
> "2. Failure to Conspicuously Post A Notice Of Surety Bond: Three (3) Violations. * * * in violation of ORS 658.415(15).
>
> "3. Failure to Furnish Written Statements To Workers Describing Working Conditions And Workers' Rights and Remedies Under Law: Fifty-Five (55) Violations. * * * in violation of ORS 658.440 (1)(f)(A) through (l).
>
> "4. Applicant's Character, Competence And Reliability Make Applicant Unfit To Act As A Farm Labor Contractor. * * * pursuant to ORS 658.420(2) and OAR 839-15-520 (3)(k)."

Regarding case number 46-89 (Contractor Pablo), the conformed pleadings read:

> "1. Acting As A Farm Labor Contractor Without A Farm Labor Contractor's License: Seven (7) Violations. * * * in violation of ORS 658.410(1) and 658.415(1). * * * Civil Penalty of $1,000.00 for each violation or $7,000.00.
>
> "2. Failure to Conspicuously Post A Notice Of Surety Bond [seven violations]. * * * in violation of ORS 658.415(15). * * * Civil Penalty of

$1,000.00 for each violation or $7,000.00.

"3. Failure to Furnish Written Statements To Workers Describing Working Conditions And Workers' Rights and Remedies Under Law: Fifty-Five (55) Violations. * * * in violation of ORS 658.440 (1)(f)(A) through (I). Civil Penalty of $500.00 for each violation or $27,500.00.

"TOTAL ALL CIVIL PENALTIES: $41,500.00."

14) On July 20, 1989, the Agency submitted copies of a newspaper article offered into evidence during the hearing, and Contractor Xavier responded with a letter dated August 14, 1989. Those documents are hereby admitted to the record.

15) Johnnie Bell, Administrator for the Support Services Division of the Agency, granted the Hearings Referee's request for an extension of time to issue the Proposed Order in these cases.

16) The Proposed Order, which included an Exceptions Notice, was issued on January 12, 1990. Exceptions were required to be filed by January 22, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Contractor Xavier operated a business which recruited, solicited, supplied, or employed workers to perform labor for another in Oregon in the production or harvesting of farm products.

2) Contract Xavier was licensed as a farm labor contractor by the State of Oregon during 1988.

3) During all times material herein, Contractor Pablo was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

4) During 1982, Contractor Pablo and his wife, Eulalia Carbajal, owned a corporation named Carbajal Farms, Inc. The president of the corporation was Contractor Pablo. The registered agent and secretary was Erasmo Carbajal. The address for the president and the registered agent was 17018 Highway 99E NE, Woodburn, Oregon.

5) During all times material herein, Contractor Pablo worked with his stepson, Contractor Xavier, in Contractor Xavier's farm labor contracting business. Contractor Pablo helped Contractor Xavier transport the workers and supervise the workers in the fields. Contractor Xavier helped Contractor Pablo pay his bills, but he did not pay wages to Contractor Pablo. Contractor Pablo advised Contractor Xavier about how to run the business, and introduced Contractor Xavier to the farmers that Contractor Pablo had worked with when he (Contractor Pablo) was a licensed farm labor contractor. Farmers paid Contractor Xavier for providing labor crews.

6) Contractor Xavier did not give workers copies of either form WH-151/WH-151S* (Rights of Workers) or form WH-153 (Agreement Between Contractor and Workers) at the time he recruited them.

7) Contractor Xavier never saw a WH-155 Notice of Compliance posted at farm labor camps described in Findings of Fact numbers 9, 14, 15, 16, 17, and 32.

8) Every day, farm workers called Contractor Pablo to find a place to live. Contractor Pablo was well known in the area because he had lived and worked there for many years, and workers knew he would not charge them a deposit for housing. Contractor Pablo helped workers find housing. Workers called Contractor Xavier regularly about housing because he spoke English.

9) During April 1988, Fran Birko, an Industrial Hygienist with the Accident Prevention Division (APD), inspected a farm labor camp at 17018 Highway 99E, Woodburn, Oregon. Contractor Pablo had owned that property since 1972. There were about 15 Hispanic men at the camp during the inspection. One of the men said that Contractor Pablo ran the camp. Birko "red tagged" – that is, closed – a loft in a barn because it was unsafe. The loft had been occupied by from 8 to 10 persons year round. About 33 persons lived in a house at the camp. Contractor Xavier recruited workers from the camp every day. He began recruiting from that camp in 1986, when he became licensed as a farm labor contractor. He transported workers in his van.

10) Belia Martinez is the sister of Contractor Xavier. She worked at La Linda's Restaurant, which was owned by Contractor Xavier and Erasmo Carbajal. Martinez told Birko that Contractor Xavier should be contacted regarding the camp at 17018 Highway 99E. When Birko contacted him, Contractor Xavier could not attend the inspection. Contractor Xavier called Contractor Pablo, who accompanied Birko during the inspection.

11) All of the occupants of the camp at 17018 Highway 99E, Woodburn, Oregon told Birko that they worked for Contractor Pablo.

12) Contractor Pablo was cited by APD on July 27, 1988, for numerous health and safety violations of the Oregon Safe Employment Act (OSEA) at the farm labor camp at 17018 Highway 99E, Woodburn, Oregon. The primary problems were: excessive accumulations of garbage at the living quarters, outdoor toilets which were overflowing and unusable, and electrical problems that presented a serious fire hazard. The farm labor camp was not registered with APD as required.

13) As a result of the APD citation, Contractor Pablo made corrections to the cited conditions at the camp. Contractor Xavier helped Contractor Pablo clean the camp.

14) On June 2, 1988, Mike Culver, Code Enforcement Officer for the City of Woodburn, inspected a building at 237 North Front Street, Woodburn. The inspection was prompted by citizen complaints about too many people living in a structure in violation of a zoning ordinance. When Culver knocked on the back door of the building, he saw about 20 Hispanic men leave the building and run up Front Street.

* Bureau of Labor and Industries forms WH-151, WH-153, and WH-155 are written in English. The same forms, written in Spanish, are numbered WH-151S, WH-153S, and WH-155S. Unless otherwise noted, any reference in this Order to forms WH-151, WH-153, and/or WH-155 is to be read to include forms WH-151S, WH-153S, and/or WH-155S.

Another officer with Culver caught one of the men, Agustin Lopez. Lopez and the other men living in the building were farm workers. Lopez told Culver that he worked for Contractor Pablo. Contractor Pablo later met Culver at the Woodburn Police Department and explained that he had rented the building at 237 North Front Street. Culver got a copy of a signed lease agreement between the land owner, Yokov Ouchinnikov, and Contractor Pablo. Since March 1988, Contractor Pablo had rented the building for $650 per month. Ouchinnikov told Culver that the workers in the building were being moved to the Star Apartments, and there would be no more problems within the city. Contractor Xavier recruited workers from that building.

15) On June 6, 1988, Culver inspected a house at 795 Hardcastle Street, Woodburn. The house was divided into two sections. A family lived in one section, and approximately 75 Hispanic people were living in the other section of the house. Culver found numerous health and safety violations. Culver interviewed Artemio Fregoso at the house. Fregoso told Culver that he was working for Contractor Pablo and that all of the workers in the house were going to work for Contractor Pablo. Fregoso was a foreman of farm labor workers and transported them to work.

16) On August 8, 1988, William Pick, Compliance Specialist with the Agency, was at the Star Apartments, 19101 Highway 99E, Hubbard, Oregon. He met a farm worker named Camarino Perez. Perez said that he and two other workers had called Contractor Pablo, and Contractor Pablo told them to go to the Star Apartments, check in, and they would be put to work. The owner of the Star Apartments was John Murray. Murray told Pick the workers living at the apartments worked for Contractor Pablo.

17) On August 9, 1988, Culver inspected a farm labor camp at 276 East Lincoln Street, Woodburn, Oregon. On the property was a two-story duplex. A family lived in the bottom apartment. Fifteen to twenty farm labor workers lived in the top apartment. Culver also saw workers living in a shed or garage in back of the duplex. From city records he found that Contractor Pablo rented the building from Yokov Ouchinnikov. Culver called APD. Steve Gossman, a compliance officer with APD, inspected the top apartment. The workers said Contractor Pablo was their employer and that he was responsible for them coming to live at that apartment. Contractor Pablo said "they helped us in working for about a week, and then they disappeared." Gossman talked with Contractor Xavier, who wanted to know when repairs needed to be made to the apartment. Contractor Xavier recruited workers at the duplex. The apartment was not registered as a farm labor camp as required by APD. No form WH-155 (Notice of Compliance) was posted in or around the apartment. On October 4, 1988, Contractor Pablo was cited by APD for numerous health and safety violations of the Oregon Safe Employment Act (OSEA).

18) Between September 30 and around October 7, 1988, Gossman inspected the farm labor camp at the Star Apartments, 19101 Highway 99E, Hubbard, Oregon. John Murray, the owner, was responsible for maintenance of the building. In June 1988, Murray had rented 10 of the 11 "motel-like" apartments to Contractor Pablo as a farm labor camp, at a rate of $2,285 per month. Contractor Pablo brought workers to live there and was in charge of them. He took care of the workers' sleeping arrangements and brought in mattresses. Contractor Xavier recruited farm workers at the apartments. Contractor Pablo and Contractor Xavier transported workers to and from the apartments on a daily basis. Murray thought that Contractor Xavier was a licensed farm labor contractor and that Contractor Pablo worked with Contractor Xavier. Murray worked with both Contractor Pablo and Contractor Xavier on problems at the apartments such as trash dumped in the wrong place and dirty apartments. There were 55 farm labor workers at the site when Gossman inspected the apartments. Several of the workers told Gossman that they came to live at the apartments through Contractor Pablo. Contractor Pablo told Gossman that he provided housing for the workers, but was not their employer. Some workers were paid for their work directly by the farmers. Contractor Pablo said that workers living in four of the apartments "worked for us." The workers paid their rent – $10 per week – to Contractor Pablo, who then paid rent by check to Murray. The Star Apartments were not registered with APD as a farm labor camp. No WH-155 Notice of Compliance was posted in or around the apartments.

19) Gossman "red-tagged" the Star Apartments because of a broken septic tank line that created a pool of sewage behind the apartments. The sewage created a serious health hazard because it was a disease source. John Murray was cited by APD for health violations of the OSEA. Gossman notified Contractor Pablo at home that the Star Apartments were being closed, and they discussed where the farm workers who lived there would go. Murray saw the workers taken from the Star Apartments to other housing in vans used by Contractor Xavier and Contractor Pablo. At a meeting in APD's office, Gossman talked with Contractor Pablo about registering the Star Apartments as a farm labor camp and registering future camps. Contractor Pablo was given registration forms. Contractor Pablo seemed to accept responsibility for both the camp at the duplex on 276 East Lincoln Street and the camp at the Star Apartments.

20) On Monday afternoon, October 3, 1988, Maria Cazares, Field Representative for the Agency, was notified by the Oregon Commission on Hispanic Affairs that the Star Apartments were being closed by APD. Cazares went to the apartments and attempted to find housing for the workers. Some workers told her that Contractor Pablo paid them every Tuesday, so they wanted to stay one more night so they could get their money. Cazares called Contractor Pablo to say the workers wanted their pay and to go back to Mexico. Contractor Pablo said, "no, tell them I have a lot of work for them still until December." He said he would try to find housing for them at a camp he had in Monitor. At around 7 p.m. Contractor Pablo called back and said

he had a place for about 25 or 30 of the workers and that he would come to pick them up. Workers told Cazares that Contractor Pablo deducted rent money from their wages and gave them rides to work. No form WH-155 (Notice of Compliance) was posted at the apartments. Cazares asked approximately 25 workers if they had ever seen forms WH-151 (Rights of Workers) or WH-153 (Agreement Between Contractor and Workers). They had not. When Cazares left at 9:30 p.m., Contractor Pablo had not arrived.

21) Gossman made a follow-up visit to the Star Apartments during which he, Murray, and Contractor Pablo measured the floor space in each apartment to determine the number of people that could live there. Gossman wrote an occupancy rate list that both Murray and Contractor Pablo initialed. Contractor Xavier helped clean up the apartments. After the problems were corrected at the apartments, Gossman removed the red tags from the doors. He reminded Contractor Pablo to register his camps. Contractor Pablo said he would. Workers came back to live in the apartments, some in vans used by Contractor Pablo and Contractor Xavier.

22) On October 10, 1988, Contractor Pablo called Bill Pick in response to a letter from the Agency. They discussed Contractor Pablo's activity with farm labor workers. Contractor Pablo was not a licensed farm labor contractor during 1988. Pick asked him to come into compliance with farm labor contractor laws. Contractor Pablo said he did not believe he needed a license because he worked for his son, Xavier, who had a license. On October 11, 1988, Contractor Pablo met with Pick at the Bureau of Labor and Industries' Salem office. Contractor Pablo was accompanied by Pete Collazo. Pick explained the Farm Labor Contractor laws to Contractor Pablo and advised him that his activities – involving recruiting workers and furnishing them lodging – required him to have a farm labor contractor license. Pick asked Contractor Pablo to obtain a license. Contractor Pablo agreed to get a license after consulting with Contractor Xavier. Based upon information that Contractor Pablo was not using any farm labor crews at the time, Pick later allowed Contractor Pablo to wait until after January 1, 1989, to obtain a license.

23) On January 27, 1989, Cazares inspected the farm labor camp at 17018 Highway 99E, Woodburn, Oregon. Eighteen farm labor workers lived at the camp. Workers said that Contractor Pablo and Contractor Xavier ran the camp. Cazares found the camp conditions unsafe and unsanitary. The house had no electricity, heat, or water. Contractor Xavier had caused Portland General Electric company to turn off the electricity. He had earlier told the workers to leave the camp, but then allowed them to stay because he did not know where else they could go. Several of the workers applied to Oregon Human Development Corporation (OHDC) for funds to turn on the electricity. Cazares reported the camp to APD. Workers said they were recruited by Contractor Pablo to live in the camp. Contractor Pablo transported them to work and paid them, deducting $1.00 per day for rent. No form WH-155 (Notice of Compliance) was posted at the camp. No worker had seen either form WH-151 (Rights of Workers) or form WH-153 (Agreement between Contractor and Workers).

24) On January 31, 1989, Contractor Xavier's 1988 farm labor contractor license expired.

25) On February 1, 1989, Cazares, Pick, and Raul Pena, Compliance Specialist for the Agency, revisited the farm labor camp at 17018 Highway 99E, Woodburn, Oregon. The farm workers told Pena that the house on the property belonged to Contractor Pablo. Some of the workers worked for Contractor Xavier. Some workers said they worked for both Contractor Pablo and Contractor Xavier. Pena tried to convince the men to leave the house, because extremely cold weather was predicted, and to move to other shelters. Contractor Xavier arrived to deliver two payroll checks. He directed two of the workers to fill out I-9 forms, which must be completed in order for a worker to be eligible to work in this country, and W-4 federal tax withholding forms. Cazares advised Contractor Xavier that she wanted to move the men due to the weather. Contractor Xavier understood why the Agency wanted to move the workers and wanted to know where the workers would be located. He said the camp should be closed, but there was no where else to house the workers. He said he was not charging them rent because of the poor conditions. The Agency moved the 18 workers. No Notice of Compliance (WH-155) was posted at the camp or in Contractor Xavier's vehicle.

26) Steve Jackson from the Statesman Journal newspaper was present while Pena and Cazares inspected the camp at 17018 Highway 99E. Jackson wrote an article about moving the 18 workers out of the camp. The article was part of a series of articles about the migrant farm workers' difficulties in finding housing and about the substandard housing. In an interview, Contractor Xavier told Jackson that the workers had no where else to go, so he was renting the house to them. Contractor Xavier said he recognized that the housing was substandard, but did not have money to fix up the camp.

27) After they left the camp, Pena, Pick, and Cazares took the workers to the Bureau of Labor and Industries' Salem office. Four of the workers were selected randomly and each interviewed privately through interpreters. They made statements and signed affidavits, excerpted below:

a) Narciso Santiago stated that a

"friend told me I might be able to find a job. This person found several people jobs with Contractor Pablo. He took me to see Pablo Carbajal. Pablo told me I could work. This was in June of 1986. Pablo did put me to work on various farms. I picked berries, cucumbers, etc. I was paid by both Pablo and Xavier Carbajal but Xavier's name always appeared on the check. Since I went to work in June of 1986 I have lived in the house at 17018 Highway 99E, Woodburn. I was charged $30.00 per month all year around. We pay our rent to Xavier Carbajal direct after he pays us and we cash our checks."

b) Juan Martinez stated that he was in a food market and a man named Omar

"approached me and asked me if I wanted to work. He took me to meet Pablo Carbajal. I actually met Pablo after I had worked in a field for about four days. Pablo told me he had a house where workers could live. He allowed me to move into the house at 17018 Hwy 99E, Woodburn. This was the week of January 23, 1989. Since then I worked for Pablo and Xavier. I was paid directly by Xavier on this date."

c) Anastacio Lopez stated that

"I had heard about Pablo Carbajal in the past but I had never met him. Last week I met a man named Omar at a market in Mt. Angel. He was a driver and took us to work pruning and training berries. After about four days I met Pablo. He told us he had a house where I could live. When I got there the house was dark and cold. Pablo said we would have to pay to get the lights turned on. He collected $4.00 from each person. After I moved in I worked in the blackberries and was paid by Xavier direct today. This was my second payday."

d) Jose Santiago stated,

"My cousin, who knew Pablo Carbajal, brought me to Oregon. I started working for Pablo Carbajal in May of 1986. * * * I have worked on a seasonal basis for Pablo since that time. When I have been paid for work I have done it has been Xavier who paid me. Pablo Carbajal sometimes gives the workers directions but most of the time we take our directions from Xavier. Sometimes I know we have worked on contracts with growers in which the workers were to be paid $4.50 an hour but the workers actually only are paid $3.50 per hour. None of the workers have ever questioned Pablo or Xavier about this discrepancy because we were all afraid we would not be allowed to continue working. When beginning a new job the workers were never informed of the terms or conditions of the work. I have never seen the forms which were shown to me identified as forms WH 151S, 153S or 155S. I have never seen any documents such as this since I have been working in the United States and more particularly since I have worked for Pablo and Xavier Carbajal. I have lived at the house at 17018 Hwy 99E from time to time while I was working for Pablo and Xavier Carbajal. I moved there in June of 1988 this last time. I paid a total of $60.00 for rent. When we're working we must pay rent. When we aren't working we don't pay rent. We do have to pay the electric bill spread out among all the workers living there. The amount varies. The most I have had to contribute is $23.00. Pablo paid $200.00 as a deposit to the electric company."

28) Pena interviewed approximately six of the workers and showed them copies to WH-151 (Rights of Workers), WH-153 (Agreement Between Contractor and Workers), and WH-155 (Notice of Compliance). The workers had not seen any of the forms.

29) From interviews with the workers, Cazares and Pick found the following:

a) The workers were usually recruited indirectly, through another person, by Pablo. Workers would be taken to a field by the other person, and Pablo would show up later and hire them to work with him.

b) Pablo would then invite the workers to live in his camp. At the camp, the workers would work with Contractor Pablo and/or Contractor Xavier.

c) Workers were usually paid by Contractor Xavier.

d) Contractor Pablo provided most of the workers with transportation in a van to and from the fields.

e) Contractor Xavier directed the workers in most of the repairs to the camp at 17018 Highway 99E. Contractor Xavier made some repairs himself. Contractor Xavier invited two of the workers who were removed from the camp to return after repairs were made.

f) Contractor Pablo and Contractor Xavier appeared to run the camps together. Contractor Pablo recruited workers to live at the camps, collected rent, and transported the workers. Contractor Xavier usually paid the workers' payroll and made repairs at the camps. Workers took directions from both Contractor Pablo and Contractor Xavier.

g) Contractor Pablo and Contractor Xavier had not given the workers written statements of the workers rights and remedies (WH-151) or of the agreement between the contractor and workers (WH-153). Nor had Contractor Pablo and Contractor Xavier posted a notice of compliance with the bonding requirements of the farm labor contractor law (WH-155).

30) On February 16, 1989, the Agency received an Application For a Farm and Forest Contractor's License from Contractor Xavier. The application was incomplete and was returned to him with instructions for completing it.

31) On April 12, 1989, Contractor Pablo advised Bill Pick that he had completed repairs and renovations at the farm labor camp at 17018 Highway 99E. Pick referred him to APD. Contractor Pablo said he intended to get a license, but needed time to raise $5,000 for the surety bond.

32) Between May 5 and 15, 1989, Corbett Stengel of APD inspected a house at 327040 South Meridian Road, Woodburn-Monitor, Oregon. The house was used as a farm labor camp. Contractor Pablo rented the house from German Ouchinnikov. Contractor Pablo and Contractor Xavier rented part of the house to a family of farm workers named Lopez. Workers at the camp said they worked for Contractor Pablo, and Contractor Pablo told them to live there. Contractor Xavier recruited workers at the camp. No WH-155 (Notice of Compliance) was posted in or around the house. On May 24, 1989, APD issue a citation to Contractor Pablo for numerous health and safety violations of the Oregon Safe Employment Act. The house was not registered as required as a farm labor camp.

33) On May 25, 1989, the Agency received a completed Application For a Farm and Forest Contractor's License from Contractor Xavier. Karen DeSanno, Licensing Unit of the Agency, assisted Contractor Xavier in filling out the application. Because the Agency was investigating Contractor Pablo's and Contractor Xavier's farm labor activities from 1988, the application was routed to Bill Pick for review. As part of the application packet, applicants are provided with Certificates of Compliance regarding forms WH-151 and WH-153. Contractor Xavier signed that certificate when he applied for a license in both 1988 and in May 1989. The certificate states that the applicant has read and understood forms WH-151 and WH-153, and will provide the information in those forms to all workers subject to the law. Copies of those forms are provided with the application packet for the applicant's use.

34) At no time during 1989 until the time of hearing did Contractor Pablo apply for a farm labor contractor license.

35) On June 2, 1989, a document entitled "Vehicle Mechanical Inspection Report For Transportation Subject To Department of Labor Safety Standards" was filled out regarding a vehicle inspection. The "Name of Carrier" was listed as Contractor Pablo, but that name is scratched out and Contractor Xavier's name was listed. Before scratching it out, Contractor Xavier listed Contractor Pablo's name because both men insure the vehicle. The vehicle inspection was required under the federal Migrant and Seasonal Agricultural Worker Protection Act. That act requires farm labor contractors who are subject to the act and who transport workers for agricultural employment to obtain from the US Department of Labor a certificate of registration.

ULTIMATE FINDINGS OF FACT

1) During 1988, Contractor Xavier was licensed as a farm labor contractor doing business in the State of Oregon. His license expired on January 31, 1989. On February 16, 1989, Contractor Xavier submitted an incomplete application for a 1989 license. On May 25, 1989, he submitted a completed application for a 1989 license. After January 31, 1989, Contractor Xavier, for an agreed remuneration or rate of pay, recruited, solicited, supplied, or employed workers to perform work for another in the production or harvesting of farm products.

2) During all times material herein, Contractor Pablo was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

3) Contractor Pablo worked with Contractor Xavier in his farm labor contractor activities as either Contractor Xavier's employee or his agent.

4) During 1988 and 1989 (until the time of hearing), Contractor Pablo recruited, solicited, supplied, or employed workers on behalf of Contractor Xavier. In addition, in connection with the recruitment or employment of workers to work in the production or harvesting of farm products, he furnished lodging for such workers at: 17018 Highway 99E NE, Woodburn; 237 North Front Street, Woodburn; 276 East Lincoln Street, Woodburn; 19101 Highway 99E, Hubbard; and 327040 South Meridian Road, Woodburn-Monitor.

5) Contractor Xavier assisted Contractor Pablo in recruiting, soliciting, supplying, or employing workers to perform work for another in the production or harvesting of farm products. Contractor Xavier assisted Contractor Pablo in furnishing lodging to farm workers at: 17018 Highway 99E NE, Woodburn; 237 North Front Street, Woodburn; 276 East Lincoln Street, Woodburn; 19101 Highway 99E, Hubbard; and 327040 South Meridian Road, Woodburn-Monitor.

6) Contractor Xavier did not furnish to any worker, at the time of hiring, recruiting, soliciting, or supplying, a written statement – in the English language and any other language used by Contractor Xavier to communicate with the worker – that contained a description of the terms and conditions of employment and the worker's rights and remedies as described in ORS 658.440(1)(f).

7) Contractor Pablo did not furnish to any worker, at the time of hiring, recruiting, soliciting, or supplying, a written statement – in the English language and any other language used by Contractor Pablo to communicate with the worker – that contained a description of the terms and conditions of employment and the worker's rights and remedies as described in ORS 658.440(1)(f).

8) Contractor Pablo never posted a form WH-155 or its equivalent at any farm labor camp described in this Order.

9) Contractor Xavier never posted a form WH-155 or its equivalent at any farm labor camp described in this Order. Nor did he post a form WH-155 or its equivalent at one or more of the job sites where his employees worked.

CONCLUSIONS OF LAW

1) ORS 658.405 provides in part:

"As used in ORS 658.405 to 658.485 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in * * * the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; or who, in connection with the recruitment or employment of workers to work in these activities, furnishes board or lodging for such workers * * *."

OAR 839-15-130 provides in part:

"The following persons are not required to obtain a farm or forest labor contractor's license:

"(8) An employee of a Farm or Forest Labor Contractor except for any employee who:

"(a) recruits, solicits, supplies or employs workers on behalf of the Farm or Forest Labor Contractor, or

" * * *

"(c) furnishes board or lodging for such workers * * *."

Contractor Pablo and Contractor Xavier were farm labor contractors.

2) ORS 648.405 to 658.485 provides that the Commissioner of the Bureau of Labor and Industries of the State of Oregon shall administer and enforce those sections. The Commissioner has jurisdiction over the Contractors and the subject matter herein.

3) ORS 658.410(1) provides in part:

"[N]o person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries."

ORS 658.415(1) provides in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.485. * * *"

Contractor Pablo violated ORS 658.410(1) and 658.415(1) by acting, as described in Ultimate Findings of Fact 3 and 4, as a farm labor contractor without a license.

4) ORS 658.440 provides in part:

"(2) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"* * *

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.584."

Contractor Xavier violated ORS 658.440(2)(e).

5) ORS 658.415 provides in part:

"(3) Each applicant shall submit with the application and shall continuously maintain thereafter, until excused, proof of financial ability to promptly pay the wages of employees and other obligations specified in this section. The proof required in this subsection shall be in the form of a corporate surety bond * * *, a cash deposit or a deposit the equivalent of cash. * * *

"* * *

"(15) Every farm labor contractor required by this section to furnish a surety bond, or make a deposit in lieu thereof, shall keep conspicuously posted upon the premises where employees working under the contractor are employed, a notice in both English and any other language used by the farm labor contractor to communicate with workers specifying the contractor's compliance with the requirements of this section * * *."

OAR 839-15-450 provides in part:

"(1) Every Farm and Forest Labor Contractor is required to post a notice in English and in any language used by the contractor to communicate with the contractor's workers. The notice must be posted in a conspicuous place on the job site where the contractor's employees are working and must be easily accessible to them.

"* * *

"(4) The Commissioner has prepared a notice (WH-155) in English and Spanish which complies with this rule. Contractors may use any form or notice so long as it contains all the elements of Form WH-155."

Contractor Xavier violated ORS 658.415(15) and OAR 839-15-450.

6) ORS 658.440(1) provides in part:

"Each person acting as a farm labor contractor shall:

"* * *

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and day care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapter 656, ORS 658.405 to 658.485, the Service Contract Act (41 USC. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner."

Contractor Pablo and Contractor Xavier repeatedly violated ORS 658.440 by failing to provide a written statement as described in subsection (1)(f) to each worker recruited, solicited, supplied, or employed.

7) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries, in the same manner as provided in ORS 183.310 to 183.550 for a contested case proceeding, may assess a civil penalty not to exceed $2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.485, recruits, solicits, supplies or employs a worker.

"* * *

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) * * * (f) * * *."

OAR 839-15-505 provides in part:

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-512 provides in part:

"(1) The civil penalty for any one violation shall not exceed $2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of $500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm * * * labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) $500 for the first offense;

"(b) $1,000 for the second offense;

"(c) $2,000 for the third and each subsequent offense."

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Contractor Pablo. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

8) ORS 658.420 provides in part:

"(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.

"(2) The commissioner shall issue a license within 15 days after the day on which the application therefor was received in the office of the commissioner if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-520 provides in part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny * * * a license application* * *:

" * * *

"(e) Assisting an unlicensed person to act as a Farm or Forest Labor Contractor; * * *

"(2) When the applicant for a license * * * demonstrates that the applicant's * * * character, reliability or competence makes the applicant * * * unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied * * *.

"(3) The following actions of a Farm or Forest Labor Contractor license applicant * * * demonstrate that the applicant's * * * character, reliability or competence make the applicant * * * unfit to act as a Farm Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485;

" * * *

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.485 and these rules;

" * * *

"(k) Employ or use an agent who * * * has otherwise violated ORS 658.405 to 658.485; * * *"

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to Contractor Xavier to act as a farm labor contractor.

OPINION

This case presents a common situation: a farm or forest labor contractor has violated several statutes and has violated each statute numerous times; however, the exact number of violations of any one statute is uncertain.

Where the Agency proposes to deny, suspend, revoke, or refuse to renew a license, the exact number of violations is not critical. In those cases, it is the nature of the repeated violations and any aggravating or mitigating circumstances that are important. In contrast, where the Agency proposes to assess a civil penalty for repeated violations, the exact number of violations is important since "a minimum of $500 for each repeated violation will be imposed" under OAR 839-15-512(2).

Each failure to comply with a statute constitutes a separate violation. *In the Matter of Jose Solis*, 5 BOLI 180 (1986); *In the Matter of John Howard Paauwe*, 5 BOLI 168 (1986); *In the Matter of Michael Burke*, 5 BOLI 47 (1985). "Each violation is a separate and distinct offense." OAR 839-15-507.

Contractor Pablo Carbajal, Sr.

The Agency charged Contractor Pablo with failure to post a notice of compliance with the requirement that contractors maintain a surety bond or a deposit with the Commissioner. "The notice must be posted in a conspicuous place on the job site where the contractor's employes are working and must be easily accessible to them." OAR 839-15-450(1) (emphasis added). Evidence showed that Contractor Pablo was an employee or agent of Contractor Xavier. Accordingly, Contractor Xavier was responsible for posting notices, because the employees were his.

Contractor Pablo violated ORS 658.410 and 658.415 by acting, as described in Ultimate Findings of Fact 3 and 4, as a farm labor contractor without a license each and every time he recruited or supplied a worker on behalf of Contractor Xavier, and each and every time he furnished lodging to a worker in connection to such recruitment or employment. Under the Commissioner's current analysis, Contractor Pablo would be liable for a civil penalty for each worker recruited or lodged, or each occasion when he recruited or lodged workers.

Here, the Agency charged Contractor Pablo with seven violations of ORS 658.410(1) and 658.415(1) (acting as a farm labor contractor without a license) based on seven camps where he furnished lodging to farm workers. The camp at 17018 Highway 99E was charged as two camps because it was allegedly used during two separate

time periods – April 1988 and January to February 1989.

The evidence was insufficient to prove that Contractor Pablo was acting as a contractor at the camp at 795 Hardcastle Street, Woodburn. However, the evidence did prove that Contractor Pablo acted as a contractor at the other five camps. The only defense or mitigating circumstance that Contractor Pablo offered was that he did not know he needed to be licensed since he was working for his son. That defense fails, as it was offered by someone (a) who was previously a licensee and (b) who was advised during the midst of these events that his actions made him a farm labor contractor and required him to comply with the law. Those two facts are aggravating circumstances because they show that, at all material times, Contractor Pablo knew or should have known that his actions violated the law. *See* OAR 839-15-510. Evidence indicated that the camp at 17018 Highway 99E was in continual use between April 1988 and January 1989. Thus, it was one camp, not two. Pursuant to OAR 839-15-512(3)(c), a civil penalty of $500 is assessed for the first offense, $1000 is assessed for the second offense, and $2000 is assessed for each of the third, fourth, and fifth offenses charged and proved.

The Agency charged Contractor Pablo with 55 violations of ORS 658.440(1)(f) for failing to furnish each worker with a written statement describing the rights of workers and the agreement between Contractor Pablo and the worker. The violations were alleged to have happened at the farm labor camps at 17018 Highway 99E (during both April 1988 and January to February 1989) and at 19101 Highway 99E (the Star Apartments).

A review of the Findings of Fact concerning those camps, reveals that: "about 33" workers lived at the house at 17018 Highway 99E camp in April 1988, and another "eight to ten" lived in the barn loft; three, "55," and "about 25 or 30" workers were estimated to live or to be present at the Star Apartments at various times; and "18" workers lived at the camp at 17018 Highway 99E in January 1989.

Contractor Pablo violated ORS 658.440(1)(f) each time he failed to furnish a worker with a written statement of working conditions and workers' rights and remedies at the time the worker was hired, recruited, or solicited or at the time the worker was supplied to another person (such as a farmer) by him. *See* OAR 839-15-310(2) and 839-15-360(4). The exact number of times Contractor Pablo violated the statute is uncertain since, in some cases, the numbers of workers are estimates. In addition, it is not clear from the evidence how many of the people lodged at the camps were lodged "in connection with the recruitment or employment of workers" by Contractor Pablo or Contractor Xavier. Where Contractor Pablo was a landlord to farm workers that were not recruited, solicited, supplied, or employed by him or Contractor Xavier, he was not a farm labor contractor and thus had no duty to furnish the written statements required by ORS 658.440. To find otherwise would mean that every landlord who rents a room to a farm worker would be a farm labor contractor, and would be required to obtain such a license. The law does not reach that far.

This much is certain: neither Contractor Pablo nor Contractor Xavier gave any worker any required written statement; and, at the very least, the four workers who provided sworn statements to the Agency (*see* Finding of Fact 27) were recruited, solicited, supplied, or employed by Contractor Pablo and Contractor Xavier. It is also certain that the Contractors recruited, solicited, supplied, or employed scores of other workers, even though the exact number is uncertain. These are aggravating circumstances due to the magnitude of the violations and the fact that the Contractors knew or should have known that their actions violated the law. *See* Finding of Fact 33. Contractor Pablo offered no mitigating circumstances, except that he did not know he needed to be licensed since he was working for his son. That defense fails here for the same reason it failed above with regard to the violations of ORS 658.410 and 658.415.

The Agency requested the minimum civil penalty of $500 for each of the 55 violations alleged. As described above, the exact number of violations was uncertain, but there were many repeated violations. The Forum has treated them as aggravating circumstances and, pursuant to OAR 839-15-512(1) and (2), a civil penalty of $2000 is assessed for each of the four identified violations.

Contractor Xavier Carbajal

The Agency proposed to deny a farm labor contractor license to Contractor Xavier because he violated provisions of ORS 658.405 to 658.485, which violations demonstrated that his character, reliability, or competence made him unfit to act as a farm labor contractor. *See* ORS 658.420; OAR 839-15-145(1)(g) and (h); and 839-15-520(1)(e), (2), and (3)(a), (f), and (k).

The Agency charged Contractor Xavier with assisting an unlicensed person, Contractor Pablo, to act as a farm labor contractor by using Contractor Pablo to recruit, solicit, supply, and/or employ farm workers on behalf of Contractor Xavier, and by helping Contractor Pablo furnish lodging to such workers at six labor camps, in violation of ORS 658.440(2)(e). The Forum has found that Contractor Pablo was acting as a farm labor contractor without a license. There is no question that Contractor Xavier assisted Contractor Pablo in those activities, and Contractor Xavier admitted that at hearing. Contractor Xavier and Contractor Pablo worked together to recruit, employ, and supply workers. Contractor Xavier helped Contractor Pablo make repairs at camps that Contractor Pablo owned or had rented to lodge farm workers. They admitted that they worked closely together and shared information. It is reasonable to infer that Contractor Xavier knew that Contractor Pablo had been told by the Agency in October 1988 to obtain a license and to come into compliance with the law. In spite of that, Contractor Xavier continued to assist Contractor Pablo in his unlicensed activities until at least May 1989.

The Agency charged Contractor Xavier with failure to post the Notice of Compliance with the statutory requirement that each farm labor contractor maintain a surety bond or deposit $5,000 with the Commissioner.

Evidence showed that no such notice was posted at any of the farm labor camps, and that no workers had ever seen such a notice while working for Contractor Xavier. OAR 839-15-450 (1) states that, "[t]he notice must be posted in a conspicuous place on the job site where the contractor's employees are working and must be easily accessible to them." It is unnecessary for the Forum to determine whether workers who were instructed by Contractor Xavier to make repairs or clean up at the camps were his "employees" for that work, or whether any of the camps constituted a "job site." The evidence proved that Contractor Xavier employed workers and that they never saw a Notice of Compliance. It is reasonable to infer from those facts that Contractor Xavier never posted the notice at at least one job site. Thus, Contractor Xavier violated ORS 658.415(15) and OAR 839-15-450.

Finally, the Agency charged Contractor Xavier with failing to furnish written statements such as WH-151 and WH-153 to each worker, and alleged 55 violations of ORS 658.440(1)(f). As noted at the beginning of this Opinion, where the Agency proposes to deny a license, the exact number of violations is not critical. In such cases, it is the nature of the repeated violations and any aggravating or mitigating circumstances that are important. The evidence proved that neither Contractor Pablo nor Contractor Xavier gave any worker any required written statement, and that the Contractors recruited, solicited, supplied, or employed scores of workers, even though the exact number is uncertain. To aggravate that, Contractor Xavier knew or should have known that his actions violated the law. *See* Finding of Fact 33.

The Agency has established the violations charged, and under ORS 658.420 and OAR 839-15-520 the Commissioner may deny Contractor Xavier a license based upon those violations. The evidence showed that Contractor Xavier knowingly violated several statutes, and violated them repeatedly. He offered no evidence that would mitigate those violations. To the contrary, the evidence showed aggravating circumstances, namely, that he and Contractor Pablo continued to operate their farm labor contractor business for months after they assured the Agency that Contractor Pablo was attempting to get a license and that he was not acting as a contractor. In addition, Contractor Xavier knowingly failed to post the Notice of Compliance at job sites, and failed to provide written statements, such as WH-151 and WH-153, to his workers. Those statements are intended to inform workers of their rights and their working conditions. Such failures demonstrate that Contractor Xavier's character, reliability, and competence make him unfit to act as a farm labor contractor, and a license should be denied.

The Commissioner recognizes that the license year during which Contractor Xavier applied (February 1, 1989, to January 31, 1990) has expired. However, an application for a Farm or Forest Labor Contractor License is considered to be pending until the license is either granted or denied. Thus, a decision to grant or deny a license is effective for the license year in which the decision is made, and not necessarily for the license year in which the application is received. *In the Matter of Demetrio Ivanov*, 7 BOLI 126, 133 (1988); *In the Matter of Raul Mendoza*, 7 BOLI 77, 85 (1988) (license application denials); *see also In the Matter of Highland Reforestation, Inc.*, 4 BOLI 185, 204 (1984), and *In the Matter of Desiderio Salazar*, 4 BOLI 154, 172 (1984) (license renewal refusals).

Pursuant to OAR 839-15-140(1)(c) and 839-15-520(4), where an application for a farm or forest labor contractor license has been denied, the Commissioner will not issue the applicant a license for a period of three years from the date of the denial.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Commissioner of the Bureau of Labor and Industries hereby orders Pablo Carbajal, Sr. to deliver to the: Hearings Unit, Bureau of Labor and Industries, 309 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIFTEEN THOUSAND FIVE HUNDRED DOLLARS ($15,500) plus any interest thereon which accrues, at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date Pablo Carbajal, Sr. complies with this Order. This assessment is the sum of the following civil penalties against the Pablo Carbajal, Sr.: $7,500 for five violations of ORS 658.410 and 658.415 found herein, and $8,000 for four violations of ORS 658.440 found herein;

AND, as authorized by ORS 658.405 to 658.485, the Commissioner of the Bureau of Labor and Industries hereby denies Xavier Carbajal a license to act as a farm or forest labor contractor, effective on the date of the Final Order.

In the Matter of

STRATEGIC INVESTMENTS OF OREGON, INC.,

Estate Builders, Inc., Patrick J. Malone, Edith M. Malone, Rick Wisegarver, Jerald E. Fox, Earle Grieg, and Vangie Grieg, Respondents.

Case Number 31-89

Final Order of the Commissioner

Mary Wendy Roberts

Issued March 14, 1990.

SYNOPSIS

Respondents Malone, apartment managers, evicted white female Complainant from her apartment due to the race of her co-tenant, a black man. The Malones were agents for Respondents Strategic Investments and Estate Builders, property management companies that managed the apartment complex, and for Respondent Fox. Fox was the owner of the property management companies that employed the Malones, and a part owner of the apartments. Respondents Grieg were part owners of the apartments. The Commissioner held that these Respondents also violated ORS 659.033 (1)(b) by evicting Complainant, and

that they and Respondents Malone were jointly liable for Complainant's damages. The Commissioner found no violation by Respondents' supervisory employee Wisegarver. The Commissioner awarded Complainant damages for expenses due to the eviction, and for her mental suffering. ORS 659.031, 659.033.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on August 8 and 9, 1989, in Room 14, Oregon State Library, Summer Street, Salem, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Forest Evashevski, Jr., Attorney at Law, Corvallis, appeared on behalf of Respondents Earle Grieg and Vangie Grieg (hereinafter Respondents Grieg), presented a Summary of the Case, argued the law and facts, interposed objections and motions, examined the witnesses, and introduced documents. Respondent Vangie Grieg was present throughout the hearing. Donna Colona (hereinafter the Complainant) was present throughout the hearing and was not represented by counsel.

Strategic Investments of Oregon, Inc. (hereinafter Respondent Strategic) and Estate Builders, Inc. (hereinafter Respondent Builders) both failed to file an answer and no representative of either attended the hearing. Respondents Patrick J. Malone and Edith M. Malone (hereinafter Respondents Malone) were not represented by counsel. Respondent Patrick Malone did not attend the hearing, but was relieved by the Hearings Referee of any default for non-attendance, following the hearing. Respondent Edith Malone was present throughout the hearing, testified as a witness, and was accorded opportunity to question all other witnesses and to present her argument in the case. Respondent Rick Wisegarver (hereinafter Respondent Wisegarver) was not represented by counsel, was present throughout the hearing, testified as a witness, and was accorded opportunity to question all other witnesses and to present his argument in the case. Respondent Jerald E. Fox (hereinafter Respondent Fox) did not attend the hearing and was not represented by counsel at the hearing.*

The Agency called as witnesses the following: the Complainant; Bobby Joe Brown; Cynthia Engles; Elaine Hickman; Arthur Manning; Maureen Reyes; and Robert Browning, Investigative Supervisor with the Agency.

The Respondents Grieg called as witnesses Marlis Embree, Respondent Edith Malone, and Respondent Rick Wisegarver. Respondent Vangie Grieg did not testify. Neither Respondent Wisegarver nor the Respondents Malone called witnesses or introduced documents.

* Counsel for Respondents Grieg stated that the Summary of the Case he filed was incorrect regarding his representation of Respondent Fox.

Having fully considered the entire record in this matter I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Rulings on Motions, Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS ON OBJECTION AND MOTIONS

1. Objection of Respondents Grieg Regarding Timeliness of Agency Case Summary

At the commencement of the hearing, Respondents Grieg through counsel objected to admitting the Agency's case summary for the reason that it was untimely, having been filed less than 10 days prior to the hearing date. The Hearings Referee ruled preliminarily that the summary was timely, having been received on the next business day after its due date, which fell on a holiday, and acknowledged that counsel could object to each item of the summary subsequently discussed. The Hearings Referee's ruling regarding timeliness is confirmed. ORS 174.120; 174.125; OAR 839-30-035(1), (2); 839-30-040(1).

2. Motions of Respondents Grieg for Directed Verdict

At the close of the Agency's case, and before adjournment of the hearing on August 8, Respondents Grieg through counsel moved for a "directed verdict" in their favor on the basis that there was no evidence linking the Griegs to wrongdoing or knowledge of wrongdoing. The motion was technically improper in that there was no jury involved, and was treated by the Referee as a motion to dismiss, which is contemplated by the rules. Noting that these Respondents had admitted an ownership interest in the apartment property and that owner liability for the acts of property managers might need to be addressed by way of post hearing briefs, the Hearings Referee denied the motion, reserving final ruling for the Final Order. A motion by a party that would be dispositive or conclude the case can only be granted by the Commissioner, OAR 839-30-070(11).

It appearing that the Agency had presented a prima facie showing of discriminatory conduct on the part of the property managers and that the Respondents Grieg were part owners, the denial of the motion is confirmed.

Respondents Grieg through counsel renewed their motion for directed verdict at the beginning of the August 9 session. The motion was subject to the same comment as to its technical inadequacy, but was again treated by the Referee as a motion to dismiss. At that time, the basis was articulated as an absence of pleading and proof of agency or of a master and servant relationship between the alleged wrongdoers and the owner or owners. The Hearings Referee again denied the motion, reserving final ruling for the Final Order. The Referee noted that there was no proof of successorship, which was pleaded. The Referee's denial of the motion is confirmed for reasons set out in the Opinion portion of this Final Order.

FINDINGS OF FACT – PROCEDURAL

1) On September 12, 1988, the Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful practice of the Respondents in expelling her from rented real property based on the race and color of another person.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint, and finding the Respondents in violation of ORS 659.033.

3) The Agency subsequently initiated conciliation efforts between the Complainant and the corporate Respondents; that conciliation failed and the case was referred to the Agency's Quality Assurance Unit for further action.

4) On March 3, 1989, the Agency prepared and served on the Respondents Strategic Investments of Oregon, Inc. and Estate Builders, Inc., Specific Charges herein, alleging that the Respondents subjected the Complainant to discriminatory eviction based on the race and color of another person in violation of ORS 659.033.

5) With the Specific Charges, the Forum served on the said Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) A copy of those charges, together with items a through d of Procedural Finding 5 above, were sent by certified mail, postage prepaid, to the last known address (supplied by the Agency) of the following, pursuant to OAR 839-30-030(1):

> Strategic Investments of Oregon, Inc., 525 NW Second Street, PO Box 870, Corvallis, Oregon 97339-0870;
>
> Guy B. Rencher, II, Registered Agent, 777 NE Second Street, PO Box 927, Corvallis, Oregon 97330;
>
> Estate Builders, Inc., 777 NE Second Street, PO Box 870, Corvallis, Oregon 97339; and
>
> Jerald E. Fox, Registered Agent, 777 NE Second Street, Corvallis, Oregon 97330.

7) Both the Notice of Contested Case Rights and Procedures (item b) in Finding 5 and the Bureau of Labor and Industries contested case hearings rules (item d) in Finding 5, at OAR 839-30-060(1), provide that an answer must be filed within 20 days of the issuance of the charging document. Both the notice and the rules also provide that a corporation must appear in contested case proceedings in this Forum through an attorney.

8) On March 23, 1989, the Forum received a letter, with attachments, of Jerald E. Fox, broker, on the letterhead of Strategic Investments of Oregon, Inc., seemingly intended as a response to the Specific Charges served on the respective registered agents of the corporate Respondents.

9) On March 24, 1989, the Hearings Referee ruled that the letter failed to meet the requirements of OAR 839-30-060(1), which describes the required contents of an answer and also was not filed by an attorney. The Hearings Referee extended the time to April 3, 1989, for the corporate Respondents to file a proper answer through counsel, noting that failure to so file would constitute a default. The ruling was sent by first-class mail to each corporate Respondent and to their respective registered agents, as well as to the Agency.

10) On April 4, 1989, the Forum received a document entitled "Answer," signed "Strategic Investments, Inc. By Jerald E. Fox, *Pro Se*" and "Estate Builders, Inc. By Jerald E. Fox, *Pro Se*." Attached to this document and incorporated by reference was a copy of the mailing received by the Forum on March 23, and a statement signed by Fox for each corporate Respondent to the effect that neither corporation could afford counsel and that refusal to allow each to file "*pro se*" was a denial of due process. The document and attachments were timely mailed.

11) On April 4, 1989, the Forum issued a Notice of Default under OAR 839-30-185. This notice was sent by first-class mail with postage prepaid to:

> Strategic Investments of Oregon, Inc., 525 NW Second Street, PO Box 870, Corvallis, Oregon 97339-0870;
>
> Guy B. Rencher, II, Registered Agent, 777 NE Second Street, PO Box 927, Corvallis, Oregon 97330;
>
> Estate Builders, Inc., 777 NE Second Street, PO Box 870, Corvallis, Oregon 97339; and
>
> Jerald E. Fox, Registered Agent, 777 NE Second Street, Corvallis, Oregon 97330.

The notice recited the prior attempted filing of an answer, the Forum's March 24 ruling, and found that the documents received by the Forum on April 4 did not meet the requirements of the Forum's rules or of Oregon statutes, and that the corporate Respondents had each failed to file an answer as required. It recited that pursuant to OAR 839-30-190, each corporate Respondent found in default had 10 days from the notice to request relief from default.

12) On April 10, 1989, the Agency timely filed its Summary of the Case.

13) On April 11, 1989, the Hearings Referee received a telephone call from Jerald Fox, who inquired whether the corporate Respondents would be allowed to present evidence in the hearing scheduled for April 19. He was advised that a defaulting party could not participate in the hearing and that a corporate party could not participate without counsel, pursuant to statute. On April 14, Fox confirmed the conversation by letter to the Hearings Referee.

14) On April 17, 1989, the Agency requested a postponement of the hearing in order to file and serve Amended Specific Charges joining further parties Respondent, as allowed by the Forum's rules. On April 18, the Hearings Referee postponed the hearing for the purpose of adding charged parties, pursuant to OAR 839-30-085(4), and

the Agency filed its Amended Specific Charges.

15) On April 19, 1989, the Forum issued the Amended Specific Charges and on April 21 the Hearings Referee confirmed the addition of charged parties in the case. The Amended Specific Charges and Second Notice of Hearing named the following as parties Respondent:

Strategic Investments of Oregon, Inc., 525 NW Second Street, PO Box 870, Corvallis, Oregon 97339-0870, by Guy B. Rencher, II, Registered Agent, 777 NE Second Street, PO Box 927, Corvallis, Oregon 97330;

Estate Builders, Inc., 777 NE Second Street, PO Box 870, Corvallis, Oregon 97339, by Jerald E. Fox, Registered Agent, 777 NE Second Street, Corvallis, Oregon 97330;

Patrick J. Malone, 2450 Lee Street SE, Salem, Oregon 97301;

Edith M. Malone, 2450 Lee Street SE, Salem, Oregon 97301;

Rick Wisegarver, c/o Strategic Investments of Oregon, 525 NW Second Street, PO Box 870, Corvallis, Oregon 97330;

Jerald E. Fox, 777 NE Second Street, PO Box 870, Corvallis, Oregon 97339-0870;

Earle Grieg, 4441 NW Elmwood Drive, Corvallis, Oregon 97330; and

Vangie Grieg, 4441 NW Elmwood Drive, Corvallis, Oregon 97330.

16) Respondent Strategic and Respondent Builders were each served through their respective registered agents by the Benton County Sheriff. Respondent Fox was served personally by the Benton County Sheriff, who made a "not found" return as to Respondent Wisegarver. The Respondents Grieg and the Respondents Malone were served by certified mail in accordance with the Forum's rules, and Respondent Wisegarver was later also served by certified mail as follows:

Rick Wisegarver, 105 Park Avenue, 13, Tillamook, Oregon 97414.

17) On May 3, 1989, Respondents Grieg through counsel moved to dismiss the Amended Specific Charges for the reason that said document alleged an unlawful employment practice, but did not allege an employer-employee relationship. Also on May 3, the Agency moved to amend what it termed "typographical errors" in the Amended Specific Charges by deleting the word "employment" in certain locations therein.

18) On May 5, 1989, the Hearings Referee allowed the requested amendment, deleting the word "employment" at particular locations within the Amended Specific Charges, and denied the Respondents Grieg's motion to dismiss.

19) On May 10, 1989, Respondents Grieg, through counsel, timely filed an answer to the Amended Specific Charges.

20) On May 15, 1989, Respondent Fox timely filed an answer to the Amended Specific Charges. Also on May 15, documents denominated "Answer" were filed on behalf of Respondent Strategic and Respondent Builders, each over the signature of Jerald E. Fox.

21) On May 15, 1989, Respondents Malone timely filed an answer to the Amended Specific Charges, and on May 17, Respondent Wisegarver timely filed an answer to the Amended Specific Charges.

22) On May 23, 1989, the Forum issued a Notice of Default under OAR 839-30-185. This notice was sent by first-class mail with postage prepaid to:

Guy B. Rencher, II, Registered Agent, Strategic Investments of Oregon, 777 NE Second Street, PO Box 927, Corvallis, Oregon 97330

Jerald E. Fox, Registered Agent, Estate Builders, Inc., 525 NW Second Street, PO Box 870, Corvallis, Oregon 97339-0870.

The notice recited the Forum's prior rulings regarding the necessity for a corporation to be represented by an attorney and found that the corporate Respondents had each failed to file an answer as required, constituting a default under OAR 839-30-185. The notice recited that pursuant to OAR 839-30-190, each corporate Respondent found in default had 10 days from the notice to request relief from default.

23) On May 31, 1989, pursuant to the request of the Agency for good cause shown, the hearing was rescheduled for August 8, 1989, in the Oregon State Library, and all participants* were so notified.

24) On July 31, 1989, the Agency timely filed its Amended Summary of the Case, and on August 2, 1989, Respondents Grieg, through counsel, timely filed their Summary of the Case. Although permitted to do so by the Forum's rules, Respondent Wisegarver and Respondents Malone, all appearing *pro se*, did not file case summaries.

25) At the commencement of the hearing, counsel for the Respondents Grieg stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it. At the commencement of the hearing, Respondent Wisegarver and Respondent Edith Malone each stated that he or she had read the Notice of Contested Case Rights and Procedures and had no questions about it.

26) Pursuant to ORS 183.415(7), the Respondents and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

27) The Case Summary of Respondents Grieg listed among legal issues a) the bureau's authority to pursue civil remedy for a complainant in this type of contested case, and b) the bureau's authority to pursue general damages for a complainant in a housing discrimination case. At the commencement of the hearing, Respondents Grieg through counsel conceded that the Agency, through the Commissioner, has authority to seek civil remedy on behalf of the Complainant in this type of case and has authority to pursue general damages in a housing discrimination case.

28) At the commencement of the hearing, Respondent Jerald E. Fox was not in attendance. Approximately

* "Participant" or "participants" includes the charged parties and the Agency. OAR 839-30-025 (17).

30 minutes after the time set for hearing in the Notice of Change of Hearing Date, the Hearings Referee noted that Respondent Fox was still not in attendance and found Respondent Fox in default pursuant to OAR 839-30-185 (2).

29) At the close of the hearing on August 9, 1989, the Hearings Referee requested medical verification of Respondent Patrick Malone's inability to attend the hearing. The Referee allowed until September 1 for receipt of this information. On August 21, the Forum received the August 11, 1989, statement of Dudley M. Bright, M.D., Salem, to the effect that Patrick Malone was unable to attend the hearing of August 8 and 9, 1989, because of his health. Based thereon, the Referee finds that Patrick Malone's non-attendance at said hearing was for good cause, that is, due to circumstances over which he had no control, and hereby relieves said Respondent of any default for said non-attendance.

30) At the close of the hearing on August 9, 1989, the Hearings Referee requested a Statement of Agency Policy and a brief from each Respondent, if they so chose, regarding:

a) the question of the standing of a complainant to obtain redress under the Oregon civil rights statutes where that complainant claims eviction because of the race of a co-tenant; and

b) the question of the liability of an owner or part owner of real property for a racially motivated eviction therefrom.

Submissions on these points were due September 1, 1989, at which time the record herein was to close.

31) On September 1, 1989, the Agency's post-hearing submission was received by the Forum. On September 6, 1989, the memorandum of counsel for Respondents Grieg, postmarked August 31, 1989, was timely received by the Forum. The record herein closed accordingly.

32) The Proposed Order, which included an Exceptions Notice, was issued on January 31, 1990. Exceptions were required to be filed by February 12, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) Respondent Strategic Investments of Oregon, Inc. was at times material an Oregon corporation engaged in property management, and Respondent Estate Builders, Inc. was also an Oregon corporation so engaged. Respondent Jerald Fox was at times material an owner of both corporations and actively directed their property management activities.

2) Respondents Strategic and Builders and Respondent Fox acted as property managers of the real property known as the Spruce Tree Apartments (hereinafter Spruce Tree), located in Salem, Oregon.

3) The Respondents Grieg were part owners (21.38 percent) of the said real property. Respondent Fox was a part owner (19.18 percent) of the said real property.

4) Spruce Tree was a multiple unit dwelling with 20 units having individual street addresses along Lee Street SE, Salem, at times material herein.

5) Respondents Malone were resident managers of Spruce Tree beginning July 13, 1988. They had 15 months' prior resident manager experience.

6) Respondent Wisegarver was employed originally in 1986 by Respondent Estate Builders, Inc. as resident manager of Spruce Tree. He was later informed that his employer was Strategic Investments of Oregon, Inc. Both companies, which dealt in property management, were owned by Respondent Jerald Fox. As a resident manager, he was supervised by Jerald Fox's son, Chris Fox. At times material, Respondent Wisegarver was a field manager and supervisor for and employee of Respondents Strategic, Builders, and Fox. He supervised the Respondents Malone for said Respondents until August 31, 1988.

7) At the time of hearing, Marlis Embree was a field supervisor for Respondent Strategic. She had held the position since April 1989. She exercised general supervision over several properties and the resident managers of those properties, including Spruce Tree and the Respondents Malone. She described Respondent Fox as her employer. Her position was similar to that held by Respondent Wisegarver in 1988. She received instructions as to policy from Respondent Fox. She knew of no policy regarding limiting or restricting blacks in tenancy at Spruce Tree or other properties managed by Respondents Strategic and Fox. She had received no complaints from black tenants during her tenure.

8) The Complainant is a white female who became a tenant of Spruce Tree at 2472 Lee Street SE in June 1988. At times material, she shared her rental premises with Arthur Manning, a black male.

9) At the time she moved into the Spruce Tree, the Complainant rented from Kathy Dall and Paul Owen, resident managers.* The Complainant signed a month-to-month lease agreement calling for $185 per month rent, a refundable security deposit of $80, and a non-refundable "administration fee" of $50. The first month's rent and the deposits were paid. Resident manager Dall signed the lease agreement on behalf of Strategic Investments of Oregon, Inc., which was described in the agreement as being retained by the owner as the exclusive managing agent for the property.

10) The Forum officially notes that the Oregon Landlord and Tenant Act allows termination of a month-to-month tenancy by either party upon not less than 30 days' written notice. ORS 91.855(2).

11) Maureen Reyes is a former Adult and Family Services employee who at times material owned and operated an adult foster home at which she employed the Complainant. Her husband was at times material an employee of the Office of Federal Contract Compliance Programs of the US Department of Labor (DOL) and had, in 1972, worked for the Agency.

12) Cynthia Engles, a white female, resided at Spruce Tree from March 27 to November 3, 1988. Owen and Dall were resident

* Some testimony refers to the last names of these two individuals as "Dalleen" and "Owens." Documents purported to be signed by each seem to read "Dall" and "Owen." For consistency, the Forum has chosen to refer to them by the latter spellings.

managers when she moved in. Her household consisted of herself, her two children who are half Asian and dark-skinned, and her boyfriend, who is Micronesian (a Pacific Islander) and dark-skinned. He is sometimes mistaken for black.

13) Earline Hickman and Bobbie Joe Brown, who are both black, moved into Spruce Tree in June 1988 with their two children, a boy, one year old, and a girl, five years old. Hickman had their third child in August 1988. They paid their initial rent and deposits to Respondent Strategic through Owen and Dall, who were then the managers. Hickman is Manning's niece and was home most of the day. Brown worked nights and was home during some parts of the day.

14) Actual ownership of Spruce Tree was not known to managers or tenants of Spruce Tree. The Respondents Grieg were unknown to managers or tenants of Spruce Tree. Tenants dealt with the resident managers or very occasionally with the "field supervisor." In turn, the resident managers dealt with the field supervisor or, if that individual was unavailable, with "the office" in Corvallis.

15) "The office" in Corvallis was the office of Strategic Investments of Oregon, Inc. It was staffed at times material by Cara Lee, Jan Marmon, and Shantell Whitney, who were usually dealt with by telephone. In addition, both Respondent Jerald Fox and his son Chris Fox were at times available there. Respondent Edith Malone dealt with Marmon by phone. Reyes dealt with Marmon in person. Embree generally dealt with Respondent Fox personally and by phone. While employed by Respondent Strategic, Respondent Wisegarver dealt variously with Marmon, Lee, Respondent Fox, or Chris Fox.

16) Embree and Respondents Malone and Wisegarver were all paid by Respondent Strategic. Respondent Wisegarver's 1988 tax return employer was Respondent Strategic.

17) At times material, as well as at or near the time of hearing, field supervisors such as Respondent Wisegarver, and resident managers such as Respondents Malone, dealt with the Corvallis office of Respondent Strategic with policy or procedure questions, either by telephone or in person. They might talk to Respondent Fox or his son Chris Fox, but usually were advised by Jan Marmon, who appeared to have decisional authority for Respondent Strategic, or Shantell Whitney, another office employee of Respondent Strategic.

18) At times material, resident managers accepted rental applications and transmitted basic information, not including the applicant's race, to the Corvallis office, which obtained a credit report. The resident manager called references, including the applicant's bank. The resident manager generally had final authority.

19) At times material, resident managers could independently initiate 72-hour notice evictions based on non-payment of rent. They could initiate 30-day "no cause" evictions only after discussion with the Corvallis office, which had final authority. It was the office that approved the Complainant's eviction. Respondents Malone did not consult with Respondent Wisegarver regarding the eviction.

20) Resident managers were instructed to be cautious about possible drug activity in the apartment complex and to initiate a "no cause" eviction if an occupant was known or suspected to be using or selling drugs. Managers were told that a continued high volume of visitors, alcohol consumption, and loud behavior were indicators of drug activity.

21) The "no cause" evictions were used when there was suspected drug activity, continued loud noises, continued trouble making, excess occupants, or intimidation of managers or other tenants.

22) Respondent E. Malone told tenants that according to their rental agreement, they were not to drink alcoholic beverages outside and that they should drink inside their apartments.

23) Manning and the Complainant were not told by the Respondents Malone, or anyone, that they were having too many visitors. The rental agreement does not limit the number of visitors a tenant may have. It does not prohibit or mention the use of alcohol, either in the common areas or in the individual apartments. It does provide that residents and their guests conduct themselves in a manner that will not disturb their neighbors' peaceful enjoyment of the premises.

24) The Complainant moved in alone, but told Dall that Arthur Manning was to move in later. The agreement provided for occupancy by two adults. Dall was aware that Manning is black.

25) Dall instructed the Complainant to bring any problem she encountered at the Spruce Tree to Dall or Paul Owen. Tenants were not required to observe any special rules or policies regarding socializing or the use of alcohol in the common areas, and tenants socialized in the common area of the Spruce Tree during the time Dall and Owen were resident managers. During that time, restrictions regarding where children could play were not enforced.

26) Manning moved into the Complainant's apartment as a co-tenant in July 1988. There were then three households, including Complainant's, with at least one black member residing at Spruce Tree. Manning was related to members of the other two households.

27) There were no complaints from tenants or the resident managers about noise or conduct concerning Manning or the Complainant or their guests, or concerning other tenants while Owen and Dall were resident managers.

28) Around mid-July 1988, Dall and Owen ceased managing the Spruce Tree and the Respondents Malone became resident managers. Dall and Owen ceased accepting rent.

29) Paul Owen provided the Agency with a notarized statement to the effect that the Complainant and Manning were the victims of bigotry because Respondent Wisegarver had told him that Respondent Fox was upset because Owen had rented to too many black families, 3 out of 20 units. When Owen was terminated, he told Respondent Wisegarver: "you're firing me because I'm part Black, aren't you?"

30) Owen was not recognizably black. Respondent Wisegarver stated

that Owen and Dall were terminated for inadequate performance involving apartment maintenance. Dall told Hickman that Strategic thought she was embezzling. She told Engles she was being fired for renting to too many blacks.

31) Respondents Wisegarver and Edith Malone denied that Respondents Fox or Strategic had ever mentioned to them that there were too many blacks at Spruce Tree.

32) The Respondents Malone did not live on the premises until August, when they moved into the manager apartment at 2450 Lee Street SE, below Brown and Hickman. In July, they were present either in their car or were set up in an empty apartment to receive rent payments. Respondent Patrick Malone handled maintenance of the buildings and grounds; Respondent Edith Malone collected rent, let apartments, and dealt with the office over matters such as evictions.

33) Shortly after the Respondents Malone became resident managers, Respondent Edith Malone told the Complainant and others that there were plans to convert the Spruce Tree to an all adult apartment.

34) Persons to whom the manager spoke regarding the plan for an all adult apartment were from households which included blacks. They did not know whether all tenants were so informed.

35) The Spruce Tree was two stories, with apartments side by side as well as one above the other. Each unit had an individual Lee Street address. It was possible in each apartment to hear radio or television or conversation from other apartments. There was room in each unit to entertain no more than 8 or 10 people in the apartment. Guests of the Complainant and Manning, as well as guests of other tenants, often gathered outside due to heat and insects in the apartments. These gatherings sometimes included consumption of alcohol.

36) Tenants and guests congregated in front in the common areas on the grass and in the parking areas without complaints from the resident managers before Respondents Malone became resident managers. No new rules of tenant conduct were announced or published when Respondents Malone became resident managers. Dall and Owen had been permissive, except for noise after 10 p.m. Respondents Malone were more strict both day and night regarding noise as well as other things. Respondents Malone seemed to want everyone to stay inside and not sit outside, especially in groups. Whites and Hispanics sat out on the porches or walkways and drank and socialized. Respondents Malone did not attempt to move tenants inside unless they were drinking with blacks, who were then the ones usually addressed. Respondents Malone's standard appeared to apply to anyone who was not white or Hispanic.

37) At times material, Manning was employed part time. He did yard work at the care facility, at the employer's home, and in Portland. He was at times at home at Spruce Tree while the Complainant was away at work.

38) During the summer months, residents, including Manning, sometimes left the apartment entry door

open. This enabled others, including the resident managers, to observe whether the resident had guests and what their activities might be.

39) Manning had many relatives in the Salem area, and most of his visitors at Spruce Tree were relatives. Many of them also visited the other two apartments occupied by Manning's relatives. He had an average of two to five visitors a day some days. He did not have as many as 15 or 20 visitors a day, and not noticeably more than any other tenant.

40) On an afternoon in mid-August after Respondents Malone became managers, several friends of Manning visited him. They had just driven from work and were socializing with Manning in front of the apartments in the parking area. The group was drinking beer.

41) Respondent Wisegarver asked Manning to take the visitors inside, stating that they couldn't park and drink out there. He also asked that the cars be moved to the street, as the lot was for tenants and space was limited. Manning cooperated and was not confrontational.

42) A few days later, Respondent Edith Malone reminded Manning and some of his visitors about not drinking in the yard. Manning again cooperated by taking the visitors inside the Complainant's apartment.

43) Both before and after these incidents, whites and Hispanics were seen socializing in the common areas on more than one occasion. Respondents Malone were observed asking them to go inside only when blacks were among the group.

44) Respondent Edith Malone did not care for Manning or his friends, but did not dislike the Complainant. Manning sensed her dislike and attributed it to his race. She denied any racial bias. As she put it, she was cautious and apprehensive of him "instinctively." She believed he treated her with hostility.

45) While the Complainant was at work on or about August 22, 1988, Manning and three of his nephews were gathered in his apartment to watch a Dallas Cowboys pre-season football game. They were watching the news after the game around 11 or 11:30 p.m. when the Salem police came to the apartment door. The police told Manning that the apartment manager had complained about noise. The police saw no problem and left. Manning went to the resident managers' apartment. Respondent Patrick Malone answered the door and didn't say anything before Respondent Edith Malone told her husband "you don't have to talk to him" and the door was closed.

46) The Complainant received a telephone call at work from Manning around 11:30 p.m. on August 22. He told her that while he and his friends had been watching football on television, the police had come by because the managers had complained that the television was too loud. He told her that the managers had called the cops on him and slammed the door in his face and that he didn't like it. The Complainant told Manning she would talk to the managers in the morning.

47) Manning did not tell the Complainant that Respondents Malone came to the door of the apartment

before they called the police. He had not seen them do so.

48) On August 23, just after 8 a.m., the Complainant returned home from work and immediately sought out Respondent Edith Malone. The Complainant asked her about the events of the evening before and was told that she would be receiving a notice of eviction. The Complainant told her that the notice would be challenged in court.

49) A 30-day termination notice addressed to the Complainant "and All Other Occupants" and dated "9/23/88" was placed on the Complainant's door on August 23, 1988, before 4 p.m.

50) The notice directed the addressees to vacate the premises of 2472 Lee Street, SE, Salem, Oregon 97301 by September 26, 1988. It was signed by Edith M. Malone, and notated "No Cause."

51) At times material, the Complainant was employed as a care-giver at an adult foster home in Salem, had worked there one year, and had been with the same employer two years. Her working hours at times material varied, either 8 a.m. to 4 p.m. or 4 p.m. to 8 a.m. She worked days on weekends, but at times worked the entire weekend, depending on staffing. She was paid by the shift.

52) The Complainant is a recovering alcoholic. At the time of the initial eviction notice, she had been sober three months. She attended her after care from White Oaks Treatment Center and Alcoholics Anonymous meetings and successfully continued to resist drinking, but experienced loss of appetite and insomnia, and had difficulty performing her job duties, which consisted of care for elderly persons. The loss of residence and the difficulty in finding another caused tension between herself and Manning, and caused the Complainant to be tense and upset to the extent that she was unable to work due to worry and trying to find other housing. She was normally a hard worker. She believed the eviction was due to Manning's color, and that made her mad and "sick inside." She did not seek medical help or additional counseling, but discussed her concerns with her employer.

53) In early September, the Complainant told Respondent Edith Malone that she had been unsuccessful in finding a place to move. She attempted to pay the September rent, which Respondent Edith Malone refused to accept.

54) Reyes had known the Complainant since February 1987 and had known Manning since March 1987. Both worked for her during times material, and she visited them socially every week or two while they lived at Spruce Tree.

55) The Complainant showed the eviction notice to her employer, who suggested that the Complainant take the matter up with the Agency. The administrative complaint was then filed by the Complainant on September 12, 1988.

56) At times material, the Complainant's employer gave her emotional support and advice, and was aware of her status as a recovering alcoholic. The Complainant was angry and upset because the Complainant believed that the eviction was because

Manning is black. Because the Complainant was "sick with worry" and "emotionally upset," the employer gave the Complainant time off and the use of the employer's car to look for housing, and hired temporary help because the Complainant was unable to work. In addition, the employer took her own time to look for suitable housing for the Complainant, and discovered that smaller, less expensive apartments were not available.

57) Aware that the resident managers had refused to accept the balance owed on the Complainant's September rent, Reyes discussed the matter with the Respondents Malone. She spoke to both of them about the Complainant's upset and Reyes's fear regarding the Complainant's continued recovery. They took the rent in cash from Reyes, but declined to allow the Complainant to stay beyond the term paid. Respondent Patrick Malone said "she's OK but we don't like him." The Respondents Malone also said they had been instructed not to talk about it and that it was up to the owners, a corporation in Corvallis.

58) Because of her concern, Reyes that afternoon went to Corvallis to persuade the owner corporation to allow the Complainant to stay at Spruce Tree. She spoke with a female in the office of Strategic Investments, who claimed to be an owner and who said, "oh, you're the lady that forced the manager to take the rent," and who also said they (the owners) would support the manager. The woman, whose name was "Jan," said that there were "some things you don't know; she's filed a Civil Rights suit against us." Reyes responded that her husband worked for DOL and that she was familiar with such complaints. The owner representative would not agree to allowing the Complainant to continue her tenancy.

59) Following the refusal of her September rent, the Complainant received process for a court proceeding alleging failure to pay rent. When her employer paid the September rent on Complainant's behalf, the proceeding was dismissed.

60) The Complainant subsequently received a 72-hour eviction notice. The district court gave her until October 15, 1988, to vacate the premises, which she did.

61) The Complainant did not find another place to live for approximately one month after leaving the Spruce Tree.

62) Between vacating the Spruce Tree and locating at 2465 Wayside Terrace, Salem (Wayside) in November 1988, the Complainant was allowed by her employer to live at the residential care facility.

63) The Complainant applied at several rentals using the Spruce Tree as a prior landlord and was unsuccessful in obtaining housing. She was not told by any prospective landlord that her reference was the reason that she never got a call. At Wayside, she used her employer as her prior landlord.

64) Rent at Spruce Tree was $185 per month; rent at Wayside was $360 per month, beginning in November 1988. Deposits required before moving in at Wayside were: electric $30 (refundable), gas $30 (refundable), security $150 (part refundable). The

Spruce Tree apartment had one bed room; the Wayside apartment had two bedrooms.

65) The Complainant took approximately one month off work while seeking housing. She was 10 minutes away from work by car at Spruce Tree and 40 minutes away at Wayside. The additional distance caused a greater gasoline expenditure than at Spruce Tree.

66) Although she did not want or need a two-bedroom apartment, and could not afford the higher rent without strain, the Complainant rented a two-bedroom because it was available and because her efforts revealed that smaller, less expensive apartments were not available. Because she considered moving a hardship and was convinced that less expensive apartments were not available, the Complainant ceased her active search after moving into Wayside.

67) Manning left the area when he and the Complainant vacated 2472 Lee Street, SE. He stayed with relatives while she lived at her place of employment. He was concerned about the effect the eviction had on her emotionally, and feared it might trigger a relapse in her alcohol recovery. He was upset because of the separation, because the Complainant was upset, and because he believed that the eviction was due to his race. He was angered by the eviction because of its affect on the Complainant. He was angry and nervous at the hearing because of a conversation initiated outside the hearing room by Respondent Griegs' counsel.

68) Neither the Complainant nor Manning used any drugs other than alcohol. They were never observed using or selling drugs.

69) Beginning with the initial eviction notice of August 23, the Complainant was subjected to a number of stresses. In addition to her concern about her status as a recovering alcoholic, she was affected by the loss of residence and the difficulty in finding another, by her belief that the eviction was because Manning is black, by the need to impose on her employer through necessity for temporary help because she was unable to work, through the use of her employer's car to look for housing, and through the employer's time looking for suitable housing, by the necessity to live at the residential care facility and use her employer as her prior landlord, and by the successive court proceedings. Once she located housing, the additional distance, the greater gasoline expenditure, and the unavailability of an affordable apartment causing her to pay higher rent she could not afford caused additional stress.

70) Lars Skilbred, white, was a tenant at Spruce Tree at 2466 Lee Street, SE, from May 1987 until July 3, 1989. He "absolutely" had a high number of visitors coming and going from his apartment. He sold drugs out the back window of his apartment. Respondents Malone found a hypodermic needle on the grounds months after the Complainant and Manning had left. No eviction action was taken regarding Skilbred until his arrest on drug charges. The management waited until there was "proof."

71) Engles was not a social friend of the Complainant and Manning. She was usually home after 3 p.m. daily, and was able to note Manning's visitors and that he was not a troublemaker.

72) In early September 1988, Engle's boyfriend was visited by his brother. They were drinking inside the Engles apartment at about 1 p.m. when Respondent Patrick Malone told them to keep the music down. Engles was not at home at the time, and the managers did not comment or complain to her later about the incident.

73) On another occasion, when her mother visited, Engles and her boyfriend and guests were asked by Respondent Patrick Malone to go inside from the front common area because of noise. They did so.

74) Around September 23, 1988, Engles received a 30-day "no cause" eviction to be out by the end of October. Her rent had always been on time, and there were no complaints about her conduct or the conduct of her children or boyfriend while Dall and Owen were there.

75) Neither of the Respondents Malone would discuss Engle's eviction with her. She was told to talk to "Rick." She was not acquainted with "Rick."

76) After her notice of eviction, it took Engles a month and a half to find another apartment.

77) When Hickman and Brown attempted to pay their July rent, which was late, Owen and Dall were not accepting rent. The Respondents Malone later said they were not yet accepting rent. After he was told that rent was not being accepted, Brown saw them accept a rental check from a white tenant. He again attempted to pay and was told to talk to "Rick." Respondent Wisegarver had mistaken Hickman's identity and wanted them to move. No other reason was ever given. After they established that Hickman was not a prior tenant, Respondent Wisegarver insisted that they pay both the July and August rent in order to retain the apartment.

78) Hickman mentioned to Respondent Edith Malone that she and Brown wanted eventually to find a house. They wished to retain the apartment at Spruce Tree because it was affordable and well located for their daughter's school. They would have stayed there longer but for the restrictions imposed by the managers regarding entertaining and where the children played, and the managers' complaints regarding noise and frequent inquiries regarding whether they were moving. They felt like an inconvenience to the Respondents Malone.

79) Brown received a written caution from Respondents Malone about loud music in his apartment. Later, when he had a night off, his white next-door-neighbor, Christine, deliberately "cranked up" stereo music at 2 a.m. Despite the poor sound barrier, there was no complaint from the Respondents Malone.

80) Hickman and Brown celebrated Brown's birthday on September 18 by having family in for dinner. Hickman advised Respondent Edith Malone of the expected visitors and to please excuse the noise. Respondent Edith Malone knocked at their door and handed Brown a disturbance notice during the evening. On other occasions, she had asked that Brown not "stomp" around the apartment when he was walking normally.

81) Respondent Patrick Malone roped off the grassy area in front of the apartments for the purpose of allowing the grass to grow. Both Respondents Malone complained about the Engles and Hickman children playing on the grass, even after the grass was grown. Respondents Malone voiced similar complaints when the children played on the balcony or stairs or in the halls. The rope was sometimes cut. Hispanic and white children played on the grass, and on the balcony and stairs and in the halls. They were not warned or reprimanded or ordered off the grass, but such restrictions applied to blacks.

82) Engles' daughter played with Hickman's daughter. They played on the lawn and were ordered off by Respondent Patrick Malone. Engles' children told her that Respondent Patrick Malone struck her daughter with a broom handle. When Engles tried to talk to him about that, he just said no kids were allowed on the grass, and Respondent Edith Malone said she didn't know anything about it.

83) Respondent Patrick Malone appeared to be aged 70 or over, was gruff, disagreeable, and not as tactful as his wife in dealing with black tenants and their children. He appeared less tolerant of black children than of white.

84) When Brown confronted him about referring to the Hickman-Brown children as "little monkeys," Respondent Patrick Malone stated that he referred to all children that way and he didn't mean anything by it. His wife described him as a "crusty old Irishman."

85) Respondent Edith Malone was hesitant, confused, and at times not consistent in portions of her testimony, particularly as to the sequence of events and conversations. Her testimony on some points was strongly contradicted by other witnesses. As a result, for the reasons given in the Opinion section of this Order, which are incorporated herein by this reference, her testimony was given less weight whenever it conflicted with other credible evidence on the record and, in some cases, her testimony was given little or no weight even when it was not controverted by other evidence. She stated that the witness Reyes intimidated her into accepting the Complainant's rent, but admitted that the conversation with Reyes was not harsh and that both were trying to help the Complainant. She acknowledged that the issue date on the 30-day eviction notice given the Complainant was incorrect and was uncertain when she had discussed the eviction action with the office, and whether it was Jan Marmon she had spoken to.

She testified that she gave several white tenants verbal and written warnings regarding noise after 10 p.m. She stated that she usually gave one or two verbal warnings on noise, then gave a written warning, a copy of which was kept in the manager's file. She stated that she preceded the written warning to Brown with a verbal warning. She testified that she had given several warnings to whites, but that not many were written. She could not specify how many written warnings, other than Brown, she had given. None were introduced in evidence.

She testified that Manning was intoxicated and belligerent the night he came to her apartment after the police had left, and that the Complainant was with him, but other testimony clearly established that the Complainant was at work.

Her impression was that Manning had many visitors daily, arriving one or two at a time with some staying 10 minutes and some longer (she stated she didn't actually time them), and with four or five congregating in the apartment at times; this happened both day and night, usually when the Complainant was away. She called the office regarding the suspicion, shared by her husband, that someone was using the apartment to sell drugs. She acknowledged that her only reason for suspecting Manning of drug activity was the high number of visitors he had, and that she never saw Manning use or sell drugs.

She acknowledged that she was concerned about the use of alcohol outside, but denied that she enforced the ban on drinking only with blacks. She testified that she spoke to blacks, Hispanics, and whites about their drinking when they were out in the parking area and in the common area, and denied that whites and Hispanics continued to drink outside.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent Strategic Investments of Oregon, Inc., was an Oregon corporation engaged in property management. Respondent Estate Builders, Inc. was also an Oregon corporation so engaged. Respondent Jerald Fox was an owner of both corporations and actively directed their property management activities. Respondents Strategic and Builders and Fox acted as property managers of the real property known as the Spruce Tree Apartments, a multiple dwelling with 20 units in Salem, Oregon.

2) The Respondents Grieg and Respondent Fox were part owners of the said real property.

3) Respondents Malone were employed by Respondents Strategic, Builders, and Fox as resident managers of Spruce Tree beginning July 13, 1988. Respondent Wisegarver was employed by Respondents Strategic, Builders, and Fox as a field supervisor, and supervised the Respondents Malone until August 31, 1988.

4) The Complainant is a white female who became a tenant of Spruce Tree in June 1988, and shared her rental premises with Arthur Manning, a black male. She signed a month-to-month lease agreement, which provided for occupancy by two adults. The resident manager, who was aware that Manning is black, signed the lease agreement on behalf of Strategic Investments of Oregon, Inc.

5) A month-to-month tenancy may be terminated by either party upon not less than 30 days' written notice.

6) Respondents Strategic and Builders had an office in Corvallis staffed by various individuals including Respondent Fox. Resident managers and field supervisors received policy direction and decisions from the office.

7) The eviction of the Complainant and Arthur Manning was because of Manning's race, black.

8) The Complainant, following the eviction notice, suffered mental and emotional upset attributable to the eviction. Suitable housing was not available, and the Complainant lived at her place of employment, although unable

to work while seeking housing. When she found housing, she experienced expenses of $325 for deposits, rent, and transportation to and from work.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in pertinent part:

"As used in ORS 659.010 to 659.110 * * * , unless the context requires otherwise:

"* * *

"(11) 'Person' includes one or more individuals [or] * * * corporations * * * *

"(12) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed with the commissioner or whose name has been added to such complaint or charge pursuant to ORS 659.050(1).

"* * *

"(14) 'Unlawful practice' means * * * any violation of ORS * * * 659.033 * * * *."

At all times material herein the Respondents Strategic Investments of Oregon, Inc., Estate Builders, Inc., Patrick J. Malone, Edith M. Malone, Rick Wisegarver, and Jerald E. Fox, as persons dealing with the rental, lease, and management of real property were subject to the pertinent provisions of ORS 659.010 to 659.435, particularly ORS 659.031 and 659.033.

At all times material herein, the Respondents Jerald E. Fox, Earle Grieg, and Vangie Grieg, as owners of real property for rental or lease, were subject to the pertinent provisions of ORS 659.010 to 659.435, particularly ORS 659.031 and 659.033.

2) ORS 659.031 provides, in pertinent part:

"As used in ORS 659.033, * * * 'purchaser' includes an occupant, * * * [or] lessee, * * *."

At all times material herein, the Complainant Donna Colona and her co-tenant Arthur Manning were "purchasers" within the meaning of ORS 659.031 and 659.033.

3) ORS 659.045 provides, in pertinent part:

"(1) * * * any person claiming to be aggrieved by a violation of ORS 659.033 may * * * make, sign and file with the Commissioner of the Bureau of Labor and Industries a verified complaint in writing which shall state the name and address of the person * * * alleged to have committed act complained of and which complaint shall set forth the particulars thereof. * * *"

OAR 839-03-010 provides, in pertinent part:

"(1) Any person claiming to be harmed by an act prohibited by the civil rights statutes which the Bureau enforces may file a complaint with the [Civil Rights] Division * * *."

ORS 659.050 provides, in pertinent part:

"(1) After the filing of any complaint under * * * ORS 659.045, the commissioner may cause prompt investigation to be made in connection therewith. If during the course of such investigation or upon the conclusion thereof it appears to the commissioner that additional persons should be named as respondents to the complaint the names of such persons may be added as respondents thereto. If the investigation discloses any substantial evidence supporting the allegations of the complaint the commissioner may cause immediate steps to be taken through conference, conciliation and persuasion to the effects of the unlawful practice and to otherwise carry out the purpose of ORS 659.010 to 659.110 * * *."

OAR 839-30-085(4) provides, in pertinent part:

"Misjoinder of * * * Charged Parties is not a ground for dismissal * * *. Parties may be added or deleted by order of the Hearings Referee on Motion of * * * the Agency * * * at any stage of the contested case proceeding. Where necessary to complete disposition of the case, the Hearings Referee may postpone the hearing to allow a newly added * * * Charged Party to prepare for the hearing."

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein, and the authority to eliminate the effects of any unlawful practice found.

4) Respondents Malone were the agents of Respondents Strategic Investments of Oregon, Inc., Estate Builders, Inc., Jerald E. Fox, Earle Grieg, and Vangie Grieg. The actions, inaction's, statements, and motivations of Respondents Malone are properly imputed herein to Respondents Strategic Investments of Oregon, Inc., Estate Builders, Inc., Jerald E. Fox, Earle Grieg, and Vangie Grieg.

5) ORS 659.033 provides, in pertinent part:

"(1) No person shall, because of race, [or] color * * * of any person:

"(a) * * *

"(b) Expel a purchaser from any real property.

"(c) Make any distinction, discrimination or restriction against a purchaser in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or in the furnishing of any facilities or services in connection therewith.

"(d) Attempt to discourage the sale, rental or lease of any real property to a purchaser.

"(e) * * *

"(f) Assist, induce, incite or coerce another person to commit an act or engage in a practice that violates this section."

The conduct of Respondent Strategic Investments of Oregon, Inc., through its agents in evicting the Complainant from real property due to the race of Mr. Manning was a violation of ORS 659.033(1)(b).

The conduct of Respondent Estate Builders, Inc., through its agents in evicting the Complainant from real property due to the race of Mr. Manning was a violation of ORS 659.033(1)(b).

The conduct of Respondent Jerald E. Fox personally and through his agents in evicting the Complainant from real property due to the race of Mr. Manning was a violation of ORS 659.033(1)(b).

The conduct of Respondents Patrick J. Malone and Edith M. Malone personally in evicting the Complainant from real property due to the race of Mr. Manning was a violation of ORS 659.033(1)(b).

The conduct of Respondents Earle Grieg and Vangie Grieg through their agents in evicting the Complainant from real property due to the race of Mr. Manning was a violation of ORS 659.033(1)(b).

The conduct of Respondent Rick Wisegarver regarding the eviction of the Complainant was not a violation of ORS 659.033(1)(b).

6) As persons in violation of ORS 659.033(1)(b), either personally or through their agents, Respondents Patrick J. Malone, Edith M. Malone, Strategic Investments of Oregon, Inc., Estate Builders, Inc., Jerald E. Fox, Earle Grieg, and Vangie Grieg are jointly and severally liable for the damages set out in the Order below.

7) Pursuant to ORS 659.010(2) and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for pecuniary loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

ORS 659.033(1) prohibits expelling a purchaser from real property because of the race of <u>any</u> person. The Forum has inferred from the evidence that this Complainant, a purchaser by definition, was "expelled," i.e., evicted, due to the race of her co-tenant.

Pertinent sections of the statute also prohibit any person from discouraging rental or lease of real property because of any person's race, or from discriminating against a purchaser because of any person's race.

The facts infer a pattern of different treatment for households including blacks, starting with the departure of Owen and Dall and the advent of the Malones as resident managers. In apparent reliance on a lease provision referring to tenant use and conduct, the management attempted to regulate the activities of tenants on the premises, even to the extent of determining where they might consume alcohol, although no prohibition or regulation of alcohol consumption is mentioned in the lease.* There was no evidence that "any rules and regulations pursuant to this agreement"** were promulgated by management or known to the tenants, other than the general prohibitions against disorderly conduct, noise, children's play location, and disturbance of one's neighbors. There was evidence that enforcement of these general prohibitions, subjective as it was, affected individual blacks and households including blacks to a greater degree than other individuals or households.

This demonstrated different treatment on the basis of race buttresses the Forum's conclusion that Complainant's eviction was racially based. It was established that Manning had several visitors daily. Many of them were related to him and to his niece, Hickman, and were black. The eviction of Complainant (and Manning) was purportedly based on the high volume of visitors and the supposition that this indicated involvement with illegal drugs. A white tenant, Skilbred, also had a high volume of visitors, and actually was involved with drugs, but was not evicted until his arrest.

Respondents Grieg interposed a motion for directed verdict at the close of the Agency's case. This was an improper motion in an administrative proceeding. *In the Matter of West Coast Grocery Company*, 4 BOLI 47 (1983). The Forum nonetheless considered the request as a motion for dismissal for failure to establish a case against the movants. The Forum has denied the request based on the proof by admission that these respondents were part owners of the property known as the Spruce Tree where the discriminatory act took place. The statutory scheme anticipates that a person responsible for "expelling" an occupant due to race be included in its prohibition. Thus, a resident manager and that manager's employer share liability for the prohibited act. It follows that persons for whom they act are also liable.

The rationale here is that the Griegs were vicariously liable for the acts of the property managers. Owners of real property reap a share of whatever benefit or profit the letting or sale of that property might produce, and also absorb a like share of any loss. An owner, whether of all or a portion of real property, cannot be insulated from liability for unlawful discrimination by the appointment of a managing agent. This is true even if the agent was not directly hired by the owner in question, and even if the act or acts giving rise to liability were not specifically approved. So long as the act or acts were within the scope of the managership, as eviction of a tenant most assuredly was, all owners are liable therefore to persons harmed by use of an unlawful standard for eviction. Liability flows from allowing to the offending managers the unrestricted authority to evict. In this context, the term "managers" includes those entities engaged in property management as well as their agents, the resident managers.

Similar reasoning leads to the conclusion that Respondent Fox is liable as an owner. He is similarly liable as the employer of the resident managers who were his agents and the agents of the corporations which he owned, directed, and controlled. Respondents Malone, as the persons initiating and, after the employer's approval, carrying out the eviction, also share the liability for the unlawful act. The corporate Respondents, Strategic and Builders, are liable through their agents and owner.

* "3) Use of Premises/ * * *, B) Conduct, Disorderly conduct shall be grounds for notice to vacate the dwelling and terminate this agreement. Resident(s) shall restrict all sound or noise to a reasonable volume. Children will not be permitted to play in halls, stairways, entrance of buildings, or in gardens or landscaped areas. Residents and their guests shall conduct themselves in a manner that will not disturb their neighbor's peaceful enjoyment of the premises (ORS 91.775(7))."

** "2) Restrictions * * * D) Law: Resident(s) shall comply with all rules and regulations pursuant to this agreement, local, state and federal law."

It is well established in this Forum that economic loss to a complainant that is directly attributable to an unlawful practice may be recovered from respondents as a means to "eliminate the effects of any unlawful practice found," ORS 659.010(2). This includes actual expenses and mental suffering damages from unlawful practices involving real property under ORS 659.033. *In the Matter of E. Harold Schipporeit*, 6 BOLI 113 (1987), *aff'd, Schipporeit v. Roberts*, 93 Or App 12, 760 P2d 1339 (1988), 308 Or 199, 778 P2d 953 (1989). Actual expense of moving, where the move was caused by the unlawful act, is recoverable. *In the Matter of Dan Stoller*, 7 BOLI 116 (1988). Where a claim of damage involves the difference between the housing denied and the alternative residence eventually obtained, the Agency must present evidence regarding comparable available housing from which a calculation can be made. *Schipporeit, supra*. This Complainant's moving expenses were not established to a degree that would allow the Forum to award reimbursement. While there is clearly some expense involved in dismantling and reestablishing a household, there was no evidence regarding actual expenses of commercial movers, if such were used, or of equipment rental, mileage, and the like if the Complainant moved herself. There was also some evidence that the location of the replacement residence increased the Complainant's commuting expense to work, but no amounts from which to calculate the increase. The Forum has awarded the amount of the Wayside security deposit of $150, since but for the unlawful act, that would have been unnecessary.

There was evidence that the Complainant's rent was increased a total of $175 per month ($360 minus $185) by the forced move. However, the increased amount was for a two-bedroom unit at Wayside. Her apartment at Spruce Tree had one bedroom. On the other hand, testimony was unrefuted that, at the time, apartments comparable in size and cost to the Spruce Tree Unit were not available, at least from August to November. Because the Complainant ceased her search after arriving at Wayside, the Forum cannot ascertain the length of time apartments comparable to the Spruce Tree were unavailable, and the award for this aspect has been limited to one month's differential.

Awards for mental suffering depend on the facts presented by each complainant. Respondents must take complainants as they find them. Here, the Forum found that Complainant experienced mental suffering due to the eviction as described in Findings of Fact numbers 52, 56, 66, and 69, suffering mentally and emotionally from conduct for which Respondents are liable.

She experienced loss of appetite and insomnia; tension between herself and Manning; felt mad and "sick inside;" was angry, upset, "sick with worry," and "emotionally upset;" had difficulty performing her job duties; was tense and upset to the extent that she was unable to work due to worry and trying to find other housing; and, when she did find it, she suffered continued economic worry due to increased expense. This anger and upset and worry continued well after the initial eviction notice.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondents Patrick J. Malone, Edith M. Malone, Strategic Investments of Oregon, Inc., Estate Builders, Inc., Jerald E. Fox, Earle Grieg, and Vangie Grieg are hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Donna Colona, in the amount of:

a) Three Hundred Twenty Five Dollars ($325), representing expenses Complainant lost as a result of Respondents' unlawful practice found herein; PLUS,

b) Interest on the foregoing, at the legal rate, accrued between November 30, 1988, and the date Respondents comply herewith, to be computed and compounded annually; PLUS,

c) Five Thousand Dollars ($5,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; PLUS,

d) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Post in a conspicuous place in a common area of the Spruce Tree Apartments for a period of one year from the date of the Final Order a copy of ORS 659.031 and 659.033, together with a notice that complaints of discrimination may be filed with the Bureau of Labor and Industries.

3) Cease and desist from discriminating against any current or future tenant or occupant because of race.

In the Matter of
KEVIN F. McGREW,
dba K. F. McGrew Company,
Respondent.

Case Number 10-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 20, 1990.

SYNOPSIS

Respondent, after being properly served with the charging document, failed to notify the Agency of an address change, failed to appear at the hearing, and was held in default. The Agency presented a prima facie case that two Claimants were employees, not independent contractors, and that Respondent willfully failed to pay them all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays, and holidays, following the date the Claimants quit. The Commissioner ordered Respondent to reimburse mileage expenses and to pay Claimants' wages due, plus penalty wages. ORS 652.140, 652.150; OAR 839-30-185.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on November 7, 1989, in the Blue Room of the State Forestry Building, 300 Fifth Street, Bay Park, Coos Bay, Oregon. Lee Bercot, Case Presenter with the Wage and Hour Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a Summary of the Case for the Agency, argued Agency policy, and examined the witnesses. Kevin McGrew, dba K. F. McGrew Company (hereinafter the Employer), did not attend the hearing and was not represented by counsel. Claimants John M. Conrad and Merrilee A. Thomas were present during the hearing and testified. Neither was represented by counsel.

The Agency called as witnesses the following: Claimants John M. Conrad and Merrilee A. Thomas; Nicholas Paul; Don Baldwin, State of Oregon Employment Division Supervisor; and Ron Kimmons, Compliance Specialist in the Agency's Medford office.

Having considered the entire record, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On June 15, 1987, Claimant Conrad filed a wage claim with the Agency, and on June 20, 1987, Claimant Thomas filed a wage claim with the Agency. They each alleged having been employed by Employer, and that Employer had failed to pay wages earned and due respectively to each of them.

2) At the same time that each filed the wage claim, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Employer.

3) On November 16, 1988, the Commissioner of the Bureau of Labor and Industries served on Employer at 555 S Empire Blvd., #8, Coos Bay, Oregon 97420, through the Sheriff of Coos County, an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Employer owed a total of $63.32 in wages and $633 in civil penalty wages to Claimant Conrad, and that Employer owed a total of $187.50 in wages and $670 in civil penalty wages to Claimant Thomas. The Order of Determination required that, within 20 days, Employer either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges. An instruction sheet served with the Determination Order advised Employer that the Agency would use the service address in all future correspondence, and that the Agency should be notified immediately of an address change.

4) On December 15, 1988, Employer filed an answer to the Order of Determination by mail, with a return address of 555 S Empire Blvd., #8, Coos Bay, Oregon 97420. Employer's answer also contained a request for a contested case hearing in this matter.

Employer's answer denied that Employer owed Claimants any unpaid wages or any penalty wages, and further set forth the affirmative defense that each Claimant was an independent contractor working on a commission basis only.

5) On September 18, 1989, the Agency sent the Forum a request for a hearing date. On September 21, 1989, the Forum issued a Notice of Hearing to the Employer, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200

6) On September 29, 1989, the Forum received by return mail the items described in Finding of Fact 5, which had been sent on September 21 by certified mail to Employer as follows:

> Kevin F. McGrew, 555 S Empire Blvd., #8, Coos Bay, Oregon 97420

The envelope was noted as follows:

> "Attempted, Not Known" "Refused" "9/25/89" "Moved Return" "Not Deliverable As Addressed – Unable To Forward"

The Forum notified the Agency of the return of the mailing.

7) On October 6, 1989, the Agency advised the Forum that the address contained in Finding of Fact 6 above was "the most recent address the Agency has for Mr. McGrew."

8) On October 30, 1989, pursuant to OAR 839-30-071, the Agency filed a Summary of the Case, including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Employer did not submit a Summary of the Case.

9) At the time and place set forth in the Notice of Hearing for this matter, the Employer did not appear or contact the Agency or the Hearings Unit. Employer had still not appeared or contacted the Agency or the Hearings Unit 30 minutes after the time set for hearing and, pursuant to OAR 839-30-185(2), the Hearings Referee found Employer in default as to the Order of Determination and proceeded with the hearing. The Forum has not received a request for relief from default from the Employer.

10) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

11) At the close of the hearing, the Hearings Referee requested from the Agency a written statement of Agency policy regarding the effect of a party's failure to actually receive a Notice of Hearing after making an appearance through filing an answer to the charging document and requesting a hearing. The request was made pursuant to OAR 839-30-175. The Hearings Referee left the hearing record open until November 18, 1989, to allow the Agency to submit the statement. On November 17, 1989, the Agency submitted a written statement of Agency policy. The record thereafter closed on November 18, 1989.

12) The Proposed Order, which included an Exceptions Notice, was issued on February 7, 1990. Proposed Order was mailed to Employer at 555 S Empire Blvd., #8, Coos Bay, Oregon 97420. Proposed Order was mailed a second time on February 14, 1990, to Employer at 950 Garfield, Coos Bay, Oregon 97420. The Hearings Referee extended the exceptions filing date to February 26, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Employer, a natural person, did business as K. F. McGrew Company, soliciting advertising in and around Coos Bay, Oregon. He utilized the services of one or more persons in the State of Oregon.

2) In May 1987, Claimant Conrad was looking for work and was referred to Employer by the Oregon State Employment Division in Coos Bay.

3) Claimant Conrad was hired by Employer on or about May 11, 1987. Claimant understood that the job involved a $500 guarantee against commission of 20 percent. He spoke with Employer at the latter's place of business, the North Bend News. Employer described Claimant's duties as selling ads for a coupon book Employer was to print. Employer assigned the work hours, requiring that Claimant be present one-half hour before starting work and one-half hour after finishing work, so that if the work day was to be 10 a.m. to 2 p.m., Claimant was to be in Employer's office between 9:30 and 10 a.m. and again between 2 and 2:30 p.m. Claimant was told to record his hours and contacts on a form provided by Employer.

4) Employer told Claimant Conrad he would receive $5.00 per week as a mileage reimbursement for using his own vehicle in connection with the work.

5) In performing his duties, Claimant Conrad identified himself to potential customers as a salesperson for K. F. McGrew Company, told the potential customer about the coupon book, and showed them sample ads, which Employer supplied to him.

6) While working for Employer, Claimant Conrad made no sales and received no pay from Employer.

7) Claimant Conrad made notes of the hours he worked. He transferred this information to an Agency form of calendar in connection with his claim. He recorded a total of 13.85 hours worked on May 12 through 14, 1987. His original notes were no longer available at the time of hearing.

8) Claimant Conrad ceased working for Employer on May 14. He asked about wages due, and Employer set a date for payment. Employer changed the date for payment on a total of eight separate occasions when Claimant Conrad would call or stop by to inquire. Employer never disputed that he owed Claimant, or gave a "commission only" reason. Employer never paid Claimant Conrad any wages or any mileage reimbursement.

9) Employer told Claimant Conrad that he didn't have the money. It is unknown whether the coupon book was ever published. Employer's connection with the North Bend News is unknown. Employer one day gave Claimant Conrad cash to buy Employer lunch. Claimant Conrad worked for Employer selling ads at the same time as Claimant Thomas. They did not always go to work at the same time, but usually saw one another each day. He saw Claimant Thomas deliver money for a sold ad to Employer on or about May 13. During the morning meeting, Employer sometimes suggested or assigned customers for the day to the sales staff. During the afternoon meeting, Employer determined what sales or prospects had been developed that day by the sales staff.

10) In May 1987, Claimant Thomas was looking for work and was referred to Employer by the Oregon State Employment Division in Coos Bay. She took the referral home to Bandon and telephoned Employer, who told her the job was to sell advertising and that the pay was $500 per month or 20 percent commission, whichever was greater.

11) Employer told Claimant Thomas she was "part of the team," which she took to mean that she was hired. When she went to his office a day or so later, Employer had her fill out an IRS W-4 form. There were no notations on the form at the time she signed it regarding her being an independent contractor or any commission arrangement.

12) Employer told Claimant Thomas that he expected a four-hour day with starting time up to her. Employer provided forms on which she was to list contacts and results, and gave her a sample coupon book to show to prospects. He occasionally suggested leads to her. She identified herself to customers as working for Employer.

13) Claimant Thomas received $50.00 in cash from Employer during her employment with him. She understood this to be a percentage of her sales to date. Employer told her he would pay her the commission percentage weekly, and if she earned less than $500 in a month's time, he would pay her the difference between her paid commissions and $500.

14) Employer told Claimant Thomas she would receive $5.00 per week as a mileage reimbursement for using her own vehicle in connection with the work. She received a total of $10.00 for this purpose.

15) Claimant Thomas made notes of the hours she worked, as directed by Employer. She transferred this information to an Agency form of calendar in connection with the processing of her claim. She recorded a total of 60 hours worked on May 14-28, 1987. Nicholas Paul, who is Claimant Thomas's fiancée, accompanied her on her calls each day she worked for Employer. He verified the accuracy of the hours she reported to the Agency.

16) On May 28, on which date she expected to be paid, Claimant Thomas discussed her misgivings about the employment with Paul, who suggested that she quit if she didn't get paid. She had previously spoken with Claimant Conrad about their mutual doubts regarding pay.

17) On May 28, when Claimant Thomas asked for her pay, Employer told her that he had spent the money he had set aside to pay his employees on his own personal expenses, but that she could come back and get it in about a week. Employer wanted Claimant Thomas to continue working, but she told him she would not if she was not to get paid.

18) A week later and again at a later time, Claimant Thomas, accompanied by Paul, demanded her wages. Employer stated both times that he didn't have the money, but that he would have. He did not dispute the $500 guarantee on either occasion.

19) At times material herein, Donald Baldwin was a supervisor on the employment side of the State of Oregon Employment Division office in Coos Bay. The duties of that office included registering job applicants and matching them to job orders from employers.

20) On June 19, 1987, in response to an inquiry from Claimant Conrad, Baldwin wrote a letter summarizing the contents of a job order placed by Employer. In the order, No. 20765-2, Employer told the Employment Division that he guaranteed $500 or 20 percent commission, whichever was higher. Baldwin extracted this information from the paper job order available to him at the time.

21) The paper record, i.e., the order itself, was destroyed after one year. The remaining record is an electronic one, which lists the job at $500 per month with no information regarding commission. The electronic record lists the persons referred out on the job order. Included on Employer's order were the names of both Claimants herein.

22) The Employment Division in general does not accept job orders from employers which are really "business opportunities." Straight commission only orders are accepted for "outside sales" when it is clear from the order that an employer-employee relationship is intended.

23) The Employment Division records the hires known to it resulting from job orders. Employer's order record reflects three hires, including the Claimants.

24) At times material, Ron Kimmons was a compliance specialist with the Agency. He wrote to Employer attempting to collect the unpaid amounts claimed by Claimants. The initial letter in each case notified Employer of the claim, of Employer's duty under the law, and what to do if Employer disputed the claim.

25) Having received no response to his correspondence, Kimmons on August 12, 1987, sent a certified mailing to Employer warning him that judgment against him could result, including penalty wages.

26) Later on August 12, Kimmons received from Employer a copy of IRS form W-4 for each Claimant, together with Employer's calculation of the amount due each Claimant. Employer determined that he owed nothing to Claimant Conrad and that he had overpaid Claimant Thomas.

27) Each calculation included an additional notation "gasoline allowance: @ $5.00 week." The calculation for Claimant Conrad continued "week 1: $10.00." The calculation for Claimant Thomas continued "week 1: $10.00, week 2: $5.00."

28) The W-4 forms each contained the hand-printed statement in the bottom margin below the signature line as follows: "By signing, I understand that I am an independant (sic) agent and am paid 30% of sales."

29) A note attached to Claimant Conrad's W-4 stated:

"John, as you will notice at the base, it says you are paid 30% of sales. According to my records, you made no sales, therefore you are entitled to no pay. Did you read the rider before you signed? EVERY w/4 says the SAME thing!"

30) The statement referred to in Finding of Fact 28 was not on the W-4 form when it was signed

31) Both Claimants understood that Employer required them to work four hours per day, and be present for ½-hour meetings both before and after four hours of calling on prospects. Claimant Thomas sometimes worked six hours in order to make up for days she was unable to work.

32) Some prospective customers expressed a negative reaction to Employer when Claimant Thomas identified for whom she was working.

33) Each Claimant had a geographic territory assigned by Employer, who set the times for reporting to Employer at the office.

34) Employer told Claimant Thomas that he was a former employee of the North Bend News, which had been published by his uncle. He said his uncle had advanced funds to him to start his own business. At one time when Claimant Thomas had demanded pay, Employer told her that he was going to ask the uncle for a little more money to pay his employees.

35) When an employee is paid a monthly salary and makes claim for unpaid hours, Agency policy is to annualize the salary, then break it back down to a weekly, then a daily, and ultimately an hourly rate. The hourly rate for the Claimants herein is $4.62, computed as follows:

Salary $500 per month times 12 months = $6,000

$6,000 divided by 52 weeks = $115.38

$115.38 divided by 5 = 23.08 per day

$23.08 divided by 5 (the required four hours plus the ½-hour "conference" at the start and close of the day) = $4.62 per hour*

36) Claimant Conrad worked a total of 13.85 hours at $4.62 per hour, earning $63.99 in wages. He was paid nothing; the balance of earned, unpaid, due, and owing wages equals $63.99. In addition, this Claimant is entitled to one week's mileage reimbursement of $5.00.

37) Claimant Thomas worked a total of 60 hours at $4.62 per hour, earning $277.20 in wages. She was paid $50.00; the balance of earned, unpaid, due, and owing wages equals $227.20. This Claimant received mileage reimbursement for two weeks, totaling $10.00. The record reflects that she worked portions of three weeks.

38) Civil penalty wages are computed in accordance with Agency policy, by multiplying the hourly rate by the hours actually worked and dividing the product by the number of days actually worked. Civil penalty wages were computed in this instance on the Wage Transcription and Computation Sheet by including the presumed

* The calculations herein differ from those in evidence as to both wages and penalty wages; a fuller explanation of these differences and the effect on the award is contained in the Opinion section, *infra*.

mileage reimbursement to arrive at the average daily rate.

39) For Claimant Conrad, civil penalty wages are as follows: $63.99 (the total wages earned) divided by 3 (the number of days worked during the claim period) equals $21.33 (the average daily rate of pay). This figure of $21.33 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $640. This figure differs slightly from that set forth in the Order of Determination.

40) For Claimant Thomas, civil penalty wages are as follows: $277.20 (the total wages earned) divided by 11 (the number of days worked during the claim period) equals $25.20 (the average daily rate of pay). This figure of $25.20 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of $756. This figure differs slightly from that set forth in the Order of Determination.

41) Employer's answer did not allege the affirmative defense of financial inability to pay the wages due at the time they accrued.

42) The testimony of both Claimants was found to be credible. They had the facts readily at their command and their statements were supported by documents and other testimony. There is no reason to determine the testimony of either Claimant to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Employer was a person doing business as K. F. McGrew Company in the State of Oregon, and employed one or more persons in the operation of that business.

2) Employer employed Claimants Conrad and Thomas as advertising salespersons during the month of May 1987. The employment agreement proposed by Employer and accepted by the respective Claimants included a salary of $500 per month or 20 percent of sales, whichever was greater. Claimants were expected to be available or actively engaged in sales a total of five hours per day, five days a week. At the direction of Employer, each Claimant kept a record of persons contacted and the result of each contact. The employment agreement included reimbursement of each Claimant's mileage expenses at $5.00 per week.

3) Claimant Conrad's last day worked was May 14, 1987. Claimant Thomas's last day worked was May 28, 1987. Each Claimant informed Employer that she or he was quitting employment at that time and asked for all wages due and owing. Employer did not pay either Claimant all wages due and owing within 48 hours of the respective quit dates nor at any time thereafter, despite numerous subsequent demands. Employer did not dispute owing the respective Claimants under the employment agreement until after the Agency had made demand on Claimants' behalf.

4) Employer was personally served with the Agency Order of Determination, and requested a contested case hearing. A Notice of Hearing was mailed to the service address, which was the last address known to the Agency.

5) Employer owes Claimant Conrad $63.99, which represents salary earned during the period May 12-14, 1987.

6) Employer owes Claimant Thomas $227.20, which represents $277.20 earned during the period May 14-28, 1987, minus $50.00 Employer paid Claimant for the period.

7) Employer owes Claimant Conrad an additional $5.00 as mileage reimbursement. Employer owes Claimant Thomas an additional $5.00 as mileage reimbursement.

8) Employer willfully failed to pay Claimants all wages earned and unpaid within 48 hours of quitting, exclusive of Saturdays, Sundays, and holidays. More than 30 days have elapsed from the due date of those wages.

9) Civil penalty wages for Claimant Conrad, computed pursuant to ORS 652.150 and Agency policy, equal $640.

10) Civil penalty wages for Claimant Thomas, computed pursuant to ORS 652.150 and Agency policy, equal $756.

CONCLUSIONS OF LAW

1) ORS 652.310(1) defines, in pertinent part, "employer" as "any person who * * * engages personal services of one or more employees * * *."

2) ORS 652.310(2) defines, in pertinent part, "employee" as: "any individual who * * * renders personal services to an employer who * * * agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services * * *." The statute exempts an independent contractor from this definition of employee.

3) During all times material herein, Employer was an employer and Claimants were each employees, subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Employer herein.

5) Employer did not attend the contested case hearing and is in default pursuant to OAR 839-30-185(2).

6) ORS 652.140(2) provides:

> "When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of such quitting shall become due and payable * * * 48 hours, excluding Saturdays, Sundays and holidays, after such employee has so quit employment."

Employer violated ORS 652.140(2) by failing to pay each Claimant all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays, and holidays, following the quit date of the respective Claimant.

7) ORS 652.150 provides:

> "If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing financial

inability to pay the wages or compensation at the time they accrued."

Employer is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140.

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Employer to pay each Claimant her or his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

The Agency's evidence established that Employer was served by the Coos County Sheriff with the charging document, i.e., the Order of Determination, pursuant to OAR 839-30-025(2)(b) and 839-30-030(1). Employer requested a contested case hearing and answered the charging document. Served with the charging document was an instruction sheet admonishing Employer to notify the Agency of any change of address. Employer's answer was filed by regular U.S. mail in an envelope listing the Empire Boulevard return address. In accordance with OAR 839-30-055 (2), the Agency addressed a Notice of Hearing to Employer at that address, i.e., the address in its file, and the Hearings Unit forwarded the document to that address by certified mail, a "means reasonably calculated to give the party notice of the scheduled hearing." Employer's non-appearance at the scheduled hearing resulted from his failure to advise the Agency of an address change. The Forum thus found Employer in default. Under a similar rule, former OAR 839-10-015 (4), a party personally served with a charging document was held in default when a notice of hearing sent by regular U.S. mail to the address known to the Agency was returned undelivered. *In the Matter of Jorrion Belinsky,* 5 BOLI 1, 10-11 (1985).

Where an employer fails to appear at hearing, he has defaulted as to the charges set forth in the Order of Determination. *In the Matter of Central Pacific Freight Lines, Inc.*, 7 BOLI 272 (1989). In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *Central Pacific, supra, citing In the Matter of Judith Wilson*, 5 BOLI 219 (1986); *In the Matter of John Cowdrey,* 5 BOLI 291 (1986); *In the Matter of Art Farbee,* 5 BOLI 268 (1986). *See also* OAR 839-30-185.

Where a charged party submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing, and may consider the answer's contents when making findings of fact. Where a charged party fails to appear at hearing, the Forum may review the answer to determine whether the charged party has set forth any evidence or defense to the charges. *Central Pacific, supra, citing In the Matter of Richard Niquette*, 5 BOLI 53 (1986); *In the Matter of Jack Mongeon,* 6 BOLI 194 (1987). In a default situation, where the employer's total contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Central Pacific, supra; Mongeon, supra.*

Employer contended in his answer that Claimants were not employees, but were hired as an independent contractors. Oregon statutory law does not define "independent contractor" for purposes of wage claim law. This Forum has previously followed Oregon case law to ascertain the distinction between an employee and an independent contractor. *See In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264 (1982), and the Oregon cases cited therein. Oregon case law holds that the primary question is the extent to which the employer has the right to control and direct the details and manner of performance of the worker's work. It focuses on control over the manner and means of accomplishing a result rather than the result itself, that is, control over how work will be done rather than just what work will be done. If the answer to this question establishes that the worker is the subordinate party, depending on the employer's business, the worker is an employee rather than an independent contractor.

In this case, the evidence on the record establishes that Employer had the right to control and direct the details and methods of Claimants' work. Claimants provided services to Employer's business, were hired for an indefinite period of time, worked exclusively for Employer on a salary basis, used only Employer's supplies, and derived no benefits other than the expected wages for their work.

Having considered all the evidence on the record, including the documents Employer submitted in response to the Agency's request for information, the Forum finds that these Claimants were not independent contractors. An agreement providing for a minimum salary was clearly established. Employer's control of Claimants' hours and method of solicitation through the use of contact forms and sample ads, and by the assignment of geographic territories, was also clearly established. The Forum specifically rejects the copies of the W-4 forms, the originals of which were altered after signature, as evidence of an independent contractor relationship. The more credible evidence establishes that Claimants were employees of Employer.

The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record showed that Employer employed Claimants during the period of the respective wage claims, and willfully failed to pay them all wages, earned and payable, when due. That evidence, which established that Employer owes Claimant Conrad $63.99, and Claimant Thomas $227, was credible, persuasive, and the best evidence available, given Employer's failure to appear at the hearing.

Regarding the mileage expense reimbursement, job related reimbursable expenses are properly included in a wage claim under ORS chapter 652. Oregon law provides that the Commissioner of the Bureau of Labor and Industries has authority to enforce wage claims, which are defined in ORS

652.320(9) as "claim[s] * * * for compensation for the employee's own personal services." It is the policy of the Bureau of Labor and Industries that unpaid job related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses. *All Season Insulation, supra.*

The record establishes that Employer has violated ORS 652.140 as alleged, and that he owes each Claimant civil penalty wages pursuant to ORS 652.150. Regarding the Forum's calculations of wages due and penalty wages, the Agency's policy is to exclude reimbursable expenses from the wages used to calculate a civil penalty. *Central Pacific, supra.* Also, in this instance, the Agency erred in using a six-hour daily work day in calculating the respective Claimant's hourly rate, and miscalculated the daily rates for penalty wages as a result. The evidence showed that a five-hour day was anticipated.

The amounts of both the unpaid wages due and of the penalty wages due differ from the figures in the charging document. Because the figures in the charging document are the only ones of which Employer had notice, the recovery of each Claimant is limited to those amounts, if the recalculation shows a higher figure. The charging document lists $63.32 unpaid wages and $633 penalty wages for Claimant Conrad, and $187.50 unpaid wages and $670 penalty wages for Claimant Thomas.

ORS 652.150 requires that the employee's wages continue "at the same rate." The average daily rate method is the Commissioner's established method for determining a claimant's rate of pay when calculating civil penalties. The Forum has used the average daily rate method consistently, and finds that it is an appropriate method of determining an employee's rate of pay based on actual earnings. *See Central Pacific, supra,* and the cases cited therein. Each Claimant's average daily rate, based upon the actual earnings during the wage claim period, is the "same rate" for purposes of ORS 652.150. A 30-day civil penalty could be more than each Claimant's respective monthly salary because the penalty accrues each day, for no more than 30 consecutive days, while each Claimant's employment agreement allowed for days off. Such a result does not render the average daily rate method invalid. This method accurately measures the rate of pay per day that each Claimant received under the agreement. Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68 (1988).

Awarding a civil penalty turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Here, the evidence established that Employer knew that he owed each Claimant wages and intentionally failed to pay those wages. There was no evidence that Employer was not a free agent. Thus, Employer's action or inaction was willful under ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Kevin F. McGrew, dba K. F. McGrew Company, to deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, the following:

A certified check payable to the Bureau of Labor and Industries in trust for John M. Conrad in the amount of SIX HUNDRED NINETY SIX DOLLARS AND THIRTY TWO CENTS ($696.32), representing $63.32 in gross earned, unpaid, due, and payable wages plus mileage reimbursement, and $633 in civil penalty wages, plus interest at the rate of nine percent per year on the sum of $63.32 from June 1, 1987, until paid, and nine percent interest per year on the sum of $633 from July 1, 1987, until paid, and

A certified check payable to the Bureau of Labor and Industries in trust for Merrilee A. Thomas in the amount of EIGHT HUNDRED FIFTY SEVEN DOLLARS AND FIFTY CENTS ($857.50), representing $187.50 in gross earned, unpaid, due, and payable wages plus mileage reimbursement, and $670 in civil penalty wages, plus interest at the rate of nine percent per year on the sum of $187.50 from June 1, 1987, until paid, and nine percent interest per year on the sum of $670 from July 1, 1987, until paid.

In the Matter of
ARKAD ENTERPRISES, INC.,
dba Quality Truck & R. V. Wash,
Respondent.

Case Numbers 07-90 and 08-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 25, 1990.

SYNOPSIS

Respondent discharged Complainant because he participated in and cooperated with an inspection by an agent of the Accident Prevention Division, and not because another member of his family had worked for Respondent. The Commissioner awarded the Complainant back wages and damages for his mental suffering. ORS 654.062(5); 659.340(1).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on November 28 and 29, 1989, in Room 220, State Office Building, 165 East Seventh Avenue, Eugene, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Arkad Enterprises, Inc., dba Quality Truck and R. V. Wash, (Respondent),

was represented by James A. Anderson, Attorney at Law, Eugene, Oregon. Counsel for Respondent presented a Summary of the Case, argued the law and facts, interposed objections and motions, examined the witnesses, and introduced documents. Paul R. Madden, Jr., (the Complainant) was present throughout the hearing. Richard Chala, principal owner of Respondent corporation, was present throughout the hearing.

The Agency called as witnesses the following: the Complainant; James A. Madden, Complainant's brother; James S. Anderson; and Allan McCullough, Senior Investigator with the Agency. The Respondent called as witnesses Richard Chala, principal owner of Respondent corporation, E. C. Vader, Zelma Tholl, and, by telephone, Micah Hamley, former manager for Respondent.

Having fully considered the entire record in this matter, the Hearings Referee hereby makes the following Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On August 15, 1988, the Complainant filed two verified complaints with the Agency, each alleging that he was the victim of the unlawful employment practice of the Respondent, one being based on family relationship and the other on opposition to an unsafe place of employment.

2) After investigation and review, the Agency issued an Administrative Determination in each instance finding substantial evidence supporting the allegations of the respective complaints and finding the Respondent in violation of ORS 659.340 and 654.062(5), respectively.

3) The Agency subsequently initiated conciliation efforts between the Complainant and the Respondent. Conciliation failed and each case was referred to the Agency's Quality Assurance Unit for further action.

4) On September 15, 1989, the Agency prepared and served on the Respondent in each case Specific Charges, alleging in case number 07-90 that the Respondent had discharged the Complainant from employment because of his family relationship to Jim Madden, his brother, in violation of ORS 659.340(1)(b), and alleging in case number 08-90 that the Respondent had discharged the Complainant from employment for cooperating with agents of the State of Oregon Accident Prevention Division, in violation of ORS 654.062(5)(a).

5) With each set of Specific Charges, the Forum served on the Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings

6) On October 5, 1989, Respondent filed its answer, dated October 3, 1989, in case number 08-90.

7) On October 20, 1989, following extensions of time granted by the Hearings Referee by telephone, Respondent filed its answer, dated October 16, 1989, in case number 07-90.

8) On November 13, 1989, Respondent through counsel filed a request for postponement, dated November 9, 1989, asking that the hearing scheduled for November 28, 1989, be rescheduled between December 22, 1989, and January 4, 1990, to accommodate the appearance of an out-of-state witness whom counsel deemed essential to the defense of the respective Specific Charges.

9) On November 14, 1989, following a telephone conversation with counsel for Respondent, the Hearings Referee requested that the Agency state its position on the available options for taking the witness's testimony. The options involved holding the hearing as scheduled and either submitting testimony of the witness by affidavit, taking testimony of the witness by telephone, or completing the rest of the evidence and taking testimony of the witness at a date in late December or very early January. A fourth option was to reset the hearing for a date upon which the witness would be available, probably January 3 and 4, 1990, since a late December date was not practicable for a two-day hearing.

10) On November 17, 1989, noting that the Agency objected to postponement but was willing to have the witness appear by telephone, the Hearings Referee Denied the request for postponement. The ruling noted further that both the Hearings Referee and the Agency were scheduled in Pendleton January 9, 1990, and that a shortage of staff from December 20 through December 31 eliminated a December date.

11) Pursuant to OAR 839-30-071, on November 21, 1989, the Agency timely filed a Summary of the Case in both cases. On November 21, 1989, the Respondent timely filed a Summary of the Case in both cases dated November 17, 1989.

12) At the commencement of the hearing, counsel for the Respondent stated that he had read the Notice of Contested Case Rights and Procedures (which accompanied each set of Specific Charges) and had no questions about it.

13) Pursuant to ORS 183.415(7), the Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed in each case, the matters to be proved in each case, and the procedures governing the conduct of the hearing.

14) At the commencement of the hearing, the Hearings Referee consolidated case number 07-90 and case number 08-90 into a joint contested case hearing, pursuant to OAR 839-30-095, and stated that those issues attributed to each case would be dealt with in a single order. The participants* stated that this was satisfactory.

15) At the hearing, neither participant moved to exclude witnesses, nor did the Hearings Referee exclude witnesses, under OAR 839-30-070(4).

* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

16) The Proposed Order, which included an Exceptions Notice, was issued on March 30, 1990. Exceptions, if any, were to be filed by April 9, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Arkad Enterprises, Inc., an Oregon corporation, under the assumed business name of Quality Truck & R. V. Wash, operated a truck wash at Coburg, Oregon, utilizing the personal service of one or more employees and controlling the means by which such service was performed.

2) Richard Chala was the president and principle stockholder of Respondent corporation, which also operated a full service car wash, detail shop and gas station at 29th and Willamette, Eugene, Oregon, about 15 miles or 25 minutes away from the truck wash. Respondent corporation purchased the truck wash in November 1984, and sold it in August 1989.

3) A "full service" car or truck wash is labor intensive, involving some hand washing and individual attention, with hand directed pressure washing as compared with merely running the vehicle through a wash machine.

4) Quality Truck and RV Wash was located on a large lot where trucker services were provided. Also located there were Roadrunner Tire and Lube Center, and Truck and Travel, which consisted of fuel facilities, a restaurant, a convenience store, and a trucker motel.

5) James S. Anderson owned and operated the Truck and Travel, and leased to Respondent the property where the truck wash was located; he was also landlord for the tire shop and formerly for a CB radio repair facility.

6) Charles Vader owned Charlie's Hydraulic Service. He was a business acquaintance of Chala for several years, and repaired equipment for Respondent during 1988.

7) Zelma Tholl was an office employee for Anderson at Truck and Travel from 1985 to July 1989. Her office was upstairs above the fuel desk, and she had a view of the parking lot, the fuel islands, and Respondent's truck wash.

8) Respondent first hired Micah Hamley in the summer of 1985. When not engaged as a full-time student, he worked variously as a detailer, carwash attendant, car wash supervisor and manager, and also as a laborer at Chala's ranch, from that time until the early summer of 1988.

9) James A. (Jim) Madden was employed by Respondent from February 29 to July 25, 1988, when his employment terminated.

10) The Complainant Paul R. Madden, Jr., was employed by Respondent as a truck washer from May 1 to August 3, 1988. He was hired by Richard Chala on the recommendation of his brother, Jim Madden.

11) The Complainant made $4.25 an hour. He worked generally a five-day week, from 8 a.m. to 4 p.m., usually accompanied by at least one other truck washer. His duties were to wash trucks and trailers, and to keep the truck bays clean during slow times.

12) Generally, the truck wash was open daily from approximately 8 a.m. to 5 p.m., except for major holidays. The facility was open as late as 9 or 10 p.m. in the summer beginning in June. When business was slow, i.e., when there were no trucks to wash, the crew called Chala for permission before closing for the day. He usually instructed them to solicit work by approaching truckers who were using other services in the complex. Chala gave permission to close if the crew reported this as unsuccessful.

13) When Jim Madden was hired, Paul Brown managed the truck wash. Jim Madden received no specific training other than being told to wash trucks. He learned to operate the machinery involved. He was never trained in customer relations or in the servicing, oiling, and maintenance of the wash equipment.

14) When Brown quit in March 1988, Chala retained the duties of "owner manager" and Jim Madden became "assistant manager." Jim Madden received 25 cents an hour more, took in the cash, and dropped the money into the safe. He could not hire or fire.

15) During times material, Chala did not go to the truck wash regularly to monitor operations because of other business interests. He monitored dollar sales. He did not himself observe service deficiencies by the Complainant or others. He relied on information from others, including the truck wash crew, his sister, customers, employees of the Truck and Travel and the Roadrunner, and finally, Hamley.

16) The Complainant received no specific training other than being told to wash trucks. He learned to operate the machinery. He was never trained in customer relations or in the servicing, oiling, and maintenance of the wash equipment.

17) In early June 1988, Chala made a business trip to California for about one week. While he was out of town, his sister checked on the operation of the truck wash by phone and reported that the truck wash had opened late, closed early, or not opened at all. From a workday of 8 a.m. to 5 p.m., the operation was supposed to expand in early June to a 9 or 10 p.m. closing. She was upset when he returned from California.

18) In 1988, as the result of an inquiry from a trucker, Tholl called the car wash and spoke to Chala's sister to report the truck wash closed early one afternoon. Tholl usually reached Chala's sister, rather than Chala, when she called the car wash. She thought the call was in April. She observed that the truck wash was closed one time for over two days, and that at other times it closed early. She knew of complaints made to the fuel desk by truckers about the quality of truck wash service and hours of operation because the fuel desk staff told her about them. Complaints to the fuel desk were written down by staff, but the record was not retained.

19) The truck wash employees were considered "crude" by the female fuel desk staff. To Tholl's knowledge, no staff person or trucker identified the Complainant as having improperly washed a truck or as being "crude," and she could not place the date or specific content of any but the April incident.

20) Vader was at the truck wash for pump problems in June, July, and August of 1988. The crew appeared

"unprofessional" to him, not dedicated to the boss, left the premises untidy, and did not treat the customers with respect.

21) Vader found the truck wash closed in early July when he went there to repair a hydraulic pump. The truck wash closed early, reason unknown, on July 2 and 3, and was closed all of July 4.

22) Vader told Chala about finding the truck wash closed. Chala told Vader that he intended to get a new crew at the truck wash.

23) Jim Madden suffered a compensable injury in April 1988. Chala did not believe it occurred on the job and told him to just take it easy rather than seek medical treatment. Madden did not lose any time off work due to the injury.

24) Ron Bugh's employment terminated in April or May 1988, as a result of the alleged mishandling of receipts. He was listed as a witness to Jim Madden's injury.

25) On July 25, 1988, Jim Madden told Chala he needed to see a doctor because his back was bothering him. Chala said he was not responsible for the condition and that he wouldn't pay for the doctor. Madden said "see you in court," or words to that effect, and returned to washing a motor home with Brad McClellan, another employee.

26) Chala followed him and asked if he was looking for other work; Madden said he was. Chala told him to finish his shift as this was his last day.

27) In June or early July 1988, Chala first mentioned to Hamley that there were difficulties at the truck wash. These involved untrustworthy workers, workers being late, and general unhappiness with the crew. In late July he asked Hamley to manage the truck wash. "He said he had fired one of the guys and wanted me to come out and manage it."

28) Chala spoke of firing the existing crew and starting over, but Hamley disagreed because he initially needed people familiar with the operation and the equipment. Hamley had previously worked at the truck wash infrequently for parts of a few days. Hamley believed he might be able to rehabilitate the old employees and kept the Complainant and Brad McClellan. Chala warned him that the Complainant might resent him because of his brother or because he might have expected to be made manager.

29) Respondent also transferred car wash employee Rueben Broadfoot and hired Ken Broadfoot, his brother. Both started working at the truck wash on the same day as Hamley, July 26, 1988.

30) Truckers were frequently difficult customers. They were rude and abusive to the truck wash employees, particularly over the prices charged and the adequacy of the wash job.

31) The Complainant was sometimes confrontational with trucker customers when they remonstrated with him about the price of the truck wash services. If truckers became abusive, the Complainant told them "back off" or "get out of my face" and that he did not set the prices.

32) At least one other employee, McClellan, in addition to Jim Madden and the Complainant, thought the prices were too high and argued with truckers as a result.

33) Truckers were often fatigued and moody, and were sometimes difficult to satisfy as to the adequacy of the truck wash services. Hamley would talk to them and calm them down; the Complainant was confrontational and argumentative, and said they should be kicked out when they were rude.

34) After he became truck wash manager, Hamley was conciliatory with truckers who complained about prices.

35) Hamley thought the prices might be high for the quality of service previously offered. When he became manager, the price of truck wash services was lowered for a time. There were also "specials" run in connection with Truck and Travel Restaurant.

36) The policy both before and after Hamley became manager was to re-wash when truckers complained about the manner in which trucks had been washed.

37) When he became manager, Hamley did not know McClellan or the Complainant. He had met Jim Madden before replacing him. He thought that McClellan was helpful and cooperative, but that the Complainant resented not getting the manager position himself.

38) Hamley found that neither McClellan nor the Complainant knew how to lubricate and maintain the truck wash machinery.

39) Hamley thought that the Complainant had an attitude problem, was reluctant to share information about the truck wash operation, was abusive and rude back to upset truckers, and sometimes left duties for Hamley to do. He reported these assessments of the Complainant to Chala.

40) Hamley spoke with the crew at least once about their reactions to grumpy truckers.

41) When he was assistant manager, Jim Madden usually opened the truck wash. The Complainant occasionally opened for him.

42) The Complainant opened the truck wash on the days he worked after Hamley became manager. Hamley usually went by the car wash in Eugene and picked up wash mix and other equipment, arriving at the truck wash between 8:30 and 10 a.m.

43) The Complainant opened the truck wash from July 26 to 31, and on August 2 and 3, 1988.

44) On the day of his termination, July 25, 1988, Jim Madden telephoned the Accident Prevention Division (APD) and reported safety and health hazards, which he believed existed at the truck wash and which he had previously brought to Chala's attention without result.

45) As a result of Jim Madden's phone call, an APD inspection occurred at the truck wash on or about August 2, 1988, resulting in citations being issued against the Respondent.

46) When the APD investigator arrived at around 10 a.m. that date, the Complainant and McClellan were working. Hamley had not yet arrived.

47) The Complainant accompanied the APD inspector and answered his questions until Hamley arrived around 10:30 or 10:45 a.m..

48) Hamley told the Complainant to return to work. The Complainant said he would like to finish the inspection.

Hamley insisted, so the Complainant went back to work. Hamley did not comment later that day to the Complainant about the Complainant accompanying the inspector or being interested in finishing the tour.

49) Hamley concluded the tour with the inspector and discussed his preliminary findings before the inspector left on August 2. The Complainant did not participate in that discussion, having returned to work.

50) After the APD inspector left the premises, the Complainant asked Hamley if he thought that the Respondent would be fined as a result of the inspection. Hamley replied that it was "more than likely he'll get fined," referring to Chala.

51) In the evening of August 2, after the APD visit, Hamley stopped by the car wash and spoke with Chala. He described the Complainant as getting out of hand and being "very insubordinate," with an attitude of "I can do what I want."

52) Hamley mentioned at that time that there were some things observed by the APD inspector that needed some "minor corrections" and that there might be violations and fines found.

53) Also that evening, Hamley told Chala that the Complainant had accompanied the APD inspector for some time before Hamley arrived, and that the Complainant wanted to continue participating in the inspection. Hamley told Chala that he told the Complainant to return to work and that the Complainant was reluctant to do so. Hamley did not tell Chala that the Complainant returned to work as instructed when Hamley insisted that he do so.

54) Chala believed that the Complainant acted inappropriately by accompanying the inspector, that it was not the Complainant's job to do so, and that the Complainant should have called the car wash when the inspector arrived.

55) Respondent was previously cited by APD for safety violations on December 3, 1986, as the result of an earlier inspection. Several of the violations found in August 1988 were repeat violations from 1986.

56) The APD inspector returned on August 8, 1988, for a formal "closing" of the inspection. The official "Citation and Notice of Penalty" was issued to Respondent on September 1, 1988.

57) Chala and Hamley speculated as to who might have called APD. Later, after the Complainant had filed his complaint with the Agency on August 15, 1988, they decided it was probably Jim Madden.

58) Chala decided on the evening of August 2, 1988, to discharge the Complainant.

59) The Complainant began work on August 3 at 8 a.m. Hamley arrived about 8:30 a.m. and Chala came in about 9 or 9:30. Hamley and Chala went to the restaurant together.

60) At the Truck and Travel, Hamley and Chala discussed Hamley's progress on correcting deficiencies pointed out by the APD inspector the day before.

61) Chala had the Complainant's final paycheck, paying him through 10 a.m. Hamley was reluctant to tell the Complainant he was fired because he feared a violent reaction. Chala agreed to do so and called the Complainant into the truck wash office.

62) Chala told the Complainant he was fired because of his difficulties with trucker customers and his attitude toward Hamley and the job. He did not mention the APD inspection.

63) The Complainant was upset by his discharge. He told Chala his prices were too high, and that's why the truck wash was losing business. After they left the office and walked outside toward the Complainant's car, both argued loudly.

64) The loud argument went on for some time, with Chala telling the Complainant that the Coburg police would be called if the Complainant returned to the truck wash.

65) During the Agency investigation of the Complainant's allegations, the Agency investigator, Alan McCullough, interviewed witnesses and summarized each interview. The summary was not verbatim, but included those items which he believed to be relevant. Statements bearing directly on the issues in the case were recorded as accurately as possible. The content of the questions asked was similarly recorded. He included exact quotes in the summary where they seemed important.

66) McCullough conducted a telephone interview with Anderson on October 31, 1988. Anderson told him that he remembered McCullough from a prior investigation. In response to direct questions, Anderson told McCullough that he didn't recall ever discussing closure of the truck wash with Chala, or that he ever complained to Chala about the way the truck wash was run, or that he ever told Chala that truckers had complained to him about the truck wash.

67) McCullough was in the hearing room when Anderson testified. Anderson did not appear to recognize him.

68) After the Complainant filed with the Civil Rights Division, Chala asked Anderson to write a letter concerning complaints about the truck wash received by Anderson or his employees at the Truck and Travel. Chala also asked him whether anyone from the Bureau of Labor and Industries had questioned him.

69) On November 30, 1988, Anderson wrote a letter to Chala. It outlined complaints of truckers about poorly washed trucks and about the truck wash opening late. It recited that Anderson had discussed this with Chala "many times over the telephone or in person," and that Chala had said he was bringing in a new crew. It was not time specific as to the discussions or the complaints. It did not single out the Complainant or any individual truck wash employee as being responsible for any deficiency mentioned. In a postscript, it stated that Anderson had not talked to anyone from the Bureau of Labor in his office or by phone.

70) Chala got complaints sometime in 1988 from Anderson or from Anderson's fuel desk and from the proprietor of Roadrunner Tire. The complaints included unsatisfactory wash jobs, rudeness by truck wash employees to truckers, and erratic truck wash hours. He got several complaints from Anderson and half a dozen from individual truckers that the truck wash crew was turning work away. He

promised the complainers that he would solve the problem and asked them for another chance to serve them. He was concerned because his dollar sales and hours of operation were down. He told Anderson that he would transfer his manager and build a new crew. He had decided by late July to put a new manager and crew in.

71) Vader was on the premises August 3. He noted yelling between Chala and an employee. He asked Hamley afterward what had happened and was told that Chala had an altercation with the Complainant and that Chala had mentioned calling the police.

72) Being fired made the Complainant feel "stupid" and "low." He looked for employment for about two months, and couldn't pay his bills. His credit was adversely affected. He was embarrassed each time he wrote "fired" on an employment application in describing his most recent employment.

73) The Complainant found subsequent employment beginning September 23, 1988, at $ 5.35 per hour for a 40-hour week. Had the Complainant continued working for the Respondent past 10 a.m., August 3, 1988, he would have earned $1,249.50 through September 22, 1988.

74) Jim Madden did not see Vader on the premises of the truck wash and did not recognize him at hearing. The Complainant did not see Vader on the premises of the truck wash and did not recognize him at hearing.

75) Chala's testimony was not wholly credible. It was riddled with inconsistencies and improbabilities. He testified that he was not aware on August 2, 1988, that he would be cited and fined as the result of the APD inspection, despite the fact that he owned the Respondent corporation when it was fined in December 1986. He repeatedly denied firing Jim Madden, characterizing the incident as a resignation. He testified he didn't know the result of the workers' compensation hearing involving Jim Madden. He was involved in only one instance in which a trucker complaint had to involve the Complainant, who was the only one working at the time, and stated that a subcontractor had also pinpointed the Complainant, but could not remember the date of either occurrence. He was unable to recall any date or day that the Complainant did not work when scheduled. He was extremely vague on dates, preferring to estimate by referring to a season, such as "early summer," "late spring," etc. He testified variously as to when he determined to "re-crew" the truck wash: when he discharged Bugh, about May; when he returned from California, early June; when he first discussed wanting Hamley to manage, late June; or when Hamley was appointed manager, late July. There was other testimony confirming his intent to re-crew, but at widely separated times: by Hamley, in May; by Vader, in early to mid-July; and by Anderson, sometime prior to his November letter. He also stated that in late June or early July, when he decided to re-crew, the crew consisted of the Maddens, Brad McClellan, and Ron Bugh, despite his other testimony that Bugh was fired in May. For the above reasons, his testimony was untrustworthy and was given less weight whenever it conflicted with credible evidence on the record.

76) Vader was extremely general in his criticism of the truck wash crew and not precise as to the timing of events. He did not have available records of each visit for repair and could not recall how many repair visits he made in 1988 to the truck wash. Although asked repeatedly and directly, he avoided giving specific incidents, words, phrasing, or attitudes of individuals among the crew, including the Complainant, and avoided describing any specific instance in which any crew member dealt "unprofessionally" with a trucker. He recalled "one case" in July when "the guys working in the truck wash were not treating the customers with respect," and were using negative and "possibly abusive" language. When pressed for examples of the language or conduct or to define unprofessional conduct, he stated that the summer 1988 truck wash crew had a "major air of unprofessionalism." He stated that professionalism in his view was "being able to communicate with somebody," "and educational level, too." "I'm talking about somebody who has the capacity to have understanding of worldly events and worldly affairs and to be the kind of person that watches out, looks for and is concerned about his fellow man."

He stated that he recognized the Complainant at hearing as being "assistant manager" at the truck wash, which the Complainant was not. He could not attribute any abusive, negative, or inappropriate language to the Complainant. He testified that he gave instructions to each crew concerning maintaining the oil level in and lubricating the pumps, but couldn't state any approximate date that he did so, or identify any specific employee whom he instructed. He assumed that finding a dry hydraulic pump meant that one of the truck wash crew had not followed his instructions. As a result, his testimony was given less weight whenever it conflicted with other credible evidence on the record. In some cases, due to inconsistencies, his testimony was not believed even when it was not directly controverted by other evidence.

77) Anderson's testimony was not totally credible due to the glaring inconsistencies existing between it and the statement he made to the Agency during its investigation of this case, and due to the inconsistencies and vagueness within the testimony itself. He told the Agency investigator on October 31, 1988, that he didn't recall discussing with Chala the way the truck wash was operating or that truckers complained to him about the truck wash from June to August 1988. Then, despite Chala's assertion that Chala requested the letter dated November 30, 1988, Anderson insisted that the letter was written as a warning under the lease agreement because he was "fed up" with complaints originating from the truck wash. He then was unable to place in time when the subject complaints occurred or when or whether they ceased. He stated that the situation improved after Hamley became manager and thought that must have been after he wrote the letter. He used an example of closure of the truck wash due to frozen pipes, which was totally out of context with

the alleged summer closures under discussion. His testimony was given little weight when it conflicted with any other more credible evidence or inference on the record.

78) Hamley's testimony was not altogether credible in that it contained inaccuracies and demonstrated a bias against the Complainant. His manner, detectable even by telephone, was flippant, and his substantive testimony was hesitant and uncertain in some areas. He did readily acknowledge "I had Richard fire him." He said of the reason for the Complainant's discharge that the "biggest thing was his being kind of abusive to truckers and not being service-oriented," "poor attitude toward the business," and "lack of loyalty."

He described the Complainant as being insubordinate and gave the reluctance to discontinue accompanying the APD inspector as a concrete example. His evaluation to Chala of the Complainant being "very insubordinate" and "getting out of hand" was coupled with his report of the Complainant's reluctance to discontinue the APD inspection tour. He stated he was shocked by the Complainant's aggressive attitude with truckers about prices, but acknowledged that the prices might have been too high, and that truckers were often fatigued, moody, and "mean or abusive." His opinion was that the Complainant was resentful of him being made manager, but he stated he didn't recall Chala cautioning him in this regard. He admitted he feared hostility from the Complainant. For these reasons and those described in the Opinion section of this Order, which are by reference incorporated herein, Hamley's testimony was given little weight where it conflicted with other more credible evidence on the record.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent corporation was doing business as Quality Truck & R. V. Wash, and was a person having one or more employees in Oregon. Richard Chala was Respondent's president and principle stockholder.

2) The Complainant was employed by Respondent from May 1 to August 3, 1988. He was hired on the recommendation of his brother, Jim Madden, who was also Respondent's employee.

3) On July 25, 1988, Chala discharged Jim Madden. On that date, Jim Madden then telephoned the Accident Prevention Division (APD) and reported safety and health hazards at the truck wash.

4) Micah Hamley, Respondent's employee, became manager of the truck wash on July 26, 1988.

5) As a result of Jim Madden's phone call, an APD inspection occurred at the truck wash on or about August 2, 1988. The inspection resulted in citations being issued against the Respondent, several of which were for repeat violations from a previous APD inspection.

6) During the August 2 inspection, the Complainant accompanied the APD inspector and answered his questions until Hamley arrived and told the Complainant to return to work. The Complainant wanted to finish the inspection, but returned to work when Hamley insisted.

7) Chala believed that the Complainant acted inappropriately and decided on the evening of August 2, 1988, to discharge him. On August 3, Chala told him he was fired.

8) The Respondent discharged the Complainant for his participation in and cooperation with an inspection by an agent of the Accident Prevention Division of the State of Oregon.

9) The Complainant suffered emotional upset, embarrassment, and financial distress as a result of the discharge.

10) The Complainant lost wages amounting to $1,249.50 as a result of the discharge.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and ORS 659.400 to 659.435.

2) ORS 654.062(5)(b) provides, in pertinent part:

> "Any employee who believes that the employee has been barred or discharged from employment or otherwise discriminated against in compensation, or in terms, conditions or privileges of employment, by any person in violation of this subsection may file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, polices and remedies established by the ORS 659.010 to 659.110 and the polices established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f)."

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein related to the alleged violation of ORS 654.062.

(3) ORS 659.340 provides, in pertinent part:

> "(1) * * * It is an unlawful employment practice for an employer solely because another member of an individual's family works or has worked for that employer to:
>
> "(a) * * *
>
> "(b) Bar or discharge from employment an individual; or
>
> "(c) Discriminate against an individual in compensation or in terms, conditions or privileges of employment
>
> "(2) * * *
>
> "(3) As used in this section:
>
> "(a) 'Employer' has the meaning for that term provided in ORS 659.010.
>
> "(b) 'Member of an individual's family' means the * * * brother * * * of the individual.
>
> "(4) Subsections (1) to (3) of this section shall be enforced by the Commissioner of the Bureau of Labor and Industries in the same

manner as provided in ORS 659.040 to 659.110 enforcement of an unlawful employment practice. Violation of subsections (1) to (3) of this section subjects the violator to the same civil and criminal penalties as provided for violation of ORS 659.010 to 659.110."

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein related to the alleged violation of ORS 659.340.

4) OAR 839-06-040 provides:

"In addition to protecting employees or prospective employees who oppose practices, file complaints, institute proceedings, or testify in proceedings, ORS 654.062(5) also protects employees or prospective employees from discrimination because they have exercised 'any right afforded by' the Act. Certain rights are directly provided by the act. * * * Certain other rights exist by necessary implication. For example: employees may request information from the Accident Prevention Division and not be discriminated against because of their request; employees interviewed by agents of APD in the course of inspections or investigations cannot subsequently be discriminated against because of their cooperation."

Cooperation and participation by an employee in an investigation conducted by agents of the Accident Prevention Division are exercises of employee rights afforded by ORS 654.001 to 654.295 and 654.750 to 654.780. The Complainant exercised rights afforded by the Oregon Safe Employment Act.

5) ORS 654.062(5) provides:

"(a) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee * * * because of the exercise of such employee * * * of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780."

The conduct of Respondent Arkad Enterprises, Inc. in discharging the Complainant was a violation of ORS 654.062(5).

6) The conduct of Respondent Arkad Enterprises, Inc. in discharging the Complainant was not a violation of ORS 659.340(1).

7) The actions, inactions, statements, and motivations of Richard Chala and Micah Hamley are properly imputed to the Respondent herein.

8) Pursuant to ORS 654.062, 659.010(2), and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award money damages to the Complainant for wage loss and emotional distress sustained, and the sum of money awarded in the Order below is an appropriate exercise of that authority.

OPINION

The evidence is uncontroverted that Respondent discharged the Complainant on August 3, 1988, the day after the State of Oregon Accident Prevention Division (APD) conducted an inspection of Respondent's truck wash, and that the inspection was precipitated by the complaint of the Complainant's brother and participated in by the Complainant. It is the reason for the discharge which constitutes the disputed issue in both sets of Specific Charges which were filed by the Agency. In the contested case hearing on those charges, the Forum chose to consolidate the charging documents, since the accusations and any defenses thereto rely on the same set of occurrences involving the same actors. There was one Complainant with one period of employment for one employer and one discharge from that employment.

The Agency's two charging documents allege alternative, and possibly interconnected, theories as to an unlawful motivation on the part of the Respondent. The Agency alleged either that Respondent, believing that Jim Madden caused the APD inspection, with its risk of sanction, retaliated against his brother, the Complainant, because of the family relationship (case number 07-90) or that the Respondent, resenting the Complainant's willing and persistent cooperation in the APD inspection, terminated his employment as a result (case number 08-90).

Jim Madden called in the complaint of workplace health and safety hazards, which initiated the APD inspection. Respondent's representatives, Chala and Hamley, speculated on August 2 as to who might have done so and suspected that it might have been a current or past employee. That narrowed the candidates to perhaps less than half a dozen, including the Complainant and his brother, the brothers Broadfoot, and Brad McClellan. But there was no overt evidence that Respondent's representative arrived at a choice at that time. It would be speculative to infer that Respondent's representatives probably blamed Jim Madden and then to infer further that Respondent fired his relative as a result.

The greater weight of the evidence suggests that it was the Complainant's activity at the time of the inspector's arrival and thereafter that incurred the displeasure of both owner and manager. Chala testified that the Complainant's actions were not appropriate. He was not merely referring to the Complainant's initial refusal to return to his duties after Hamley arrived. He believed that the Complainant should not have accompanied the inspector, but rather should have called Chala and /or waited for Hamley. The greater weight of the evidence leads the Forum to conclude that Chala's dissatisfaction with the Complainant's cooperation in the APD inspection played a key role in the discharge. The Forum also infers that Hamley's report about the Complainant, that he was "getting out of hand" and "very insubordinate," flowed directly from the Complainant's willing cooperation with APD, and Hamley's sense that the Complainant was either usurping Hamley's role or defying Hamley's directions. Hamley failed to tell Chala that the Complainant did return to work when Hamley asserted his authority, although it is plain that he did so. The Complainant was discharged as a result of his cooperation with an agent of the Accident Prevention Division.

In reaching this conclusion, the Forum is mindful of Respondent's

defense based on the deficient job performance attributed to the Complainant. The record reflects Chala's continuing dissatisfaction with the operation of the truck wash in 1988, at least up to late July. It also reveals a tendency on the part of Chala to blame the largely untrained and unsupervised crew and their reaction to an admittedly difficult clientele. A number of complaints ranging from failure to wash properly, to rudeness to customers, to failure to maintain equipment, to disregard of operating hours, to turning away customers, to employee dishonesty were apparently communicated to or known by Chala both before and after the Complainant became employed. His avowed reaction, confirmed by sheer numbers of witnesses, was an intention to "re-crew." It is not possible to determine which of the described problems was considered the more serious by Chala, since his reaction was the same to all: a stated intent to re-crew followed by delay in doing so. The Complainant was not singled out individually or warned concerning performance, except perhaps by Hamley as to dealing politely with truckers. The Complainant was allowed to open the truck wash after Hamley took over and was the senior person present until Hamley came in for the day. But for the arrival of the APD inspector on August 2, the weight of the evidence suggests that the Complainant would have continued working.

Employment at Respondent's truck wash was not exactly a career opportunity. The record suggests a high turnover in a near minimum wage job. One witness's expectation of truck wash employees having an understanding of worldly events and affairs and concern for their fellow man is as unrealistic as the manager's subjective evaluation of the Complainant as having a "poor attitude toward the business" and a "lack of loyalty." Nonetheless, the Complainant lost wages for an approximate two-month period after the discharge. In addition, he testified credibly to upset and embarrassment from being fired. This Forum has previously recognized that the anxiety and uncertainty connected with loss of employment income is compensable. *In the Matter of Spear Beverage Company,* 2 BOLI 240 (1982). The trauma of sudden and unexpected termination, coupled with the specter and uncertainties of unemployment, are also compensable when attributable to an unlawful practice. *In the Matter of the City of Portland,* 2 BOLI 41 (1980). This Complainant did not testify to sleepless nights, visceral discomfort, or a need for medical attention. He did establish economic stress and repeated, if short-lived, embarrassment while seeking other employment. The Forum is therefore awarding the sum of $400 to compensate for his mental distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for PAUL R. MADDEN, JR., in the amount of:

a) ONE THOUSAND TWO HUNDRED FORTY-NINE DOLLARS AND FIFTY CENTS ($1,249.50), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) ONE HUNDRED SEVENTY-FIVE DOLLARS AND NINETY-THREE CENTS ($175.93), representing interest on the lost wages at the annual rate of nine percent accrued between September 22, 1988, and March 30, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between March 31, 1990, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

d) FOUR HUNDRED DOLLARS ($400), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order herein and the date Respondent complies therewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any worker who opposes any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780, makes any complaint or institutes or causes to be instituted any proceeding under or has testified or is about to testify in any such proceeding, or because of the exercise of such employee on behalf of the employee or others of any right afforded by ORS 654.001 to 654.295 and 654.750 to 654.780.

In the Matter of
FRANKO OIL COMPANY,
dba AM/PM Market,
Respondent.

Case Number 22-90
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 27, 1990.

SYNOPSIS

Two agents of corporate Respondent entered one of Respondent's convenience stores in an intoxicated condition, subjected the black female Complainant working there to racial insults, and then purported to fire her. The Commissioner found the discharge was racially based, in violation of ORS 659.030(1)(a). Rejecting Respondent's claim that the Complainant submitted a resignation, which the evidence showed was later obtained by trickery, the Commissioner awarded Complainant $10,392 for lost wages and $15,000 for mental distress. ORS 659.030(1)(a).

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings

Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 21, 1990, in Room 311 of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined witnesses, and introduced documents. Donna Smith (Complainant) was present throughout the hearing and was not represented by counsel. Lynn C. Tuttle, Attorney at Law, appeared on behalf of Franko Oil Company (Respondent), argued the law and facts, made objections and motions, examined witnesses, and introduced documents.

The Agency called the following witnesses (in alphabetical order): Pat Blank, Investigative Supervisor for the Agency; LeLea Rhodes, a customer of Respondent's market and Complainant's friend; Complainant Donna Smith; and Guy Smith, Complainant's husband. Respondent called the following witness: Donna Smith, Complainant.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 10, 1987, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent discriminated against her because of her race or color in that, on September 11, 1987, Respondent terminated her.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.030.

3) The Agency subsequently initiated conciliation efforts between the Complainant and Respondent. Conciliation failed and the case was referred to the Agency's Quality Assurance Unit for further action.

4) On December 27, 1989, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent had discharged Complainant from employment because of her race or color, and that Respondent's action violated ORS 659.030(1)(a).

5) With the Specific Charges, the Hearings Unit served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) As of January 16, 1990, the Hearings Unit had not received a responsive pleading from Respondent as required by OAR 839-30-060.

7) On January 18, 1990, Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges, and, in effect, requested relief from default.

8) On January 23, 1990, the Hearings Referee issued to Respondent a default notice, pursuant to OAR 839-30-185. In addition, the Hearings Referee granted Respondent's request for relief from default because Respondent had reasonably relied on incorrect information from its registered agent regarding the time for filing the answer.

9) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. Although required to do so under the provisions of OAR 839-30-071, Respondent did not submit a Summary of the Case.

10) A pre-hearing conference was held on February 21, 1990, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings. In addition, the Agency and Respondent stipulated that: on or about December 10, 1987, the Complainant Donna Smith filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she was the victim of the unlawful employment practices of the Respondent, and the division found substantial evidence of said practices on the part of Respondent. Those facts are hereby admitted to the record.

11) At the commencement of the hearing, the attorney for Respondent stated that she had read the Notice of Contested Case Rights and Procedures and had no question about it.

12) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) The Proposed Order, which included an Exceptions Notice, was issued on March 19, 1990. Exceptions, if any, were to be filed by March 29, 1990. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Franko Oil Company was an Oregon corporation and owner/ operator of an AM/PM Market located at 9200 SE Holgate in Portland, Oregon, and an employer in this state utilizing the personal services of one or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Between August 1987 and August 1988, Respondent employed 127 persons, including Complainant, as attendants or cashiers. Of that number, three employees were black, two were Indian, one was Hispanic, one was Asian, eight were not identified by race or national origin, and 112 were white.

3) Complainant is a black person.

4) Complainant was employed by Respondent as a cashier at the 9200 SE Holgate, Portland, Oregon, AM/PM Market ("Market") between August 28 and September 11, 1987.

5) On her job application was a statement directly above her signature that said, in part,

> "I understand my employment will be on a trial basis for sixty days. During this period I may resign without the customary notice and

likewise be released without notice."

6) Complainant was interviewed for the job and hired by Nick Rudge. He was her supervisor and had the power to hire and fire employees. A regional manager named Mike was Rudge's supervisor.

7) Complainant worked the graveyard shift, which was from 11 p.m. to 7 a.m. Nick Rudge posted a weekly schedule on a wall in the market. The schedule ran from Monday through Sunday. Complainant worked Sunday night through Friday night and finished on Saturday at 7 a.m. Between August 28 and September 11, 1987, Complainant missed one day of work due to illness. On that occasion, Rudge arranged for a replacement worker.

8) Complainant's rate of pay was $3.25 per hour. After 30 days, she was eligible for a raise of from 25 to 50 cents per hour, provided her performance had been satisfactory. Thereafter, she was eligible for a raise every six months.

9) The market was connected to a gas station. Complainant worked with Ralph Bisbee, a white male, who was the gas station attendant on the graveyard shift.

10) Nick Rudge came into the market every morning. He told Complainant that she was doing a good job, kept the Market clean, and could expect a raise after 30 days. No one expressed any concerns or complaints about her work performance. She had no problems with her co-workers.

11) On Friday, September 11, 1987, Complainant reported for her shift at 10:45 p.m. She took over from a woman named "Nina" and Roy Fremont, who worked the previous shift. They counted the money and Nina turned over to Complainant "everything" that was supposed to be put into the safe. Nina and Fremont left. About an hour later, Complainant discovered a roll of money from the previous shift in a drawer where it should not have been. She talked with Bisbee and then called Nina and Fremont. She wanted them to come back to the market and see her put the money in the safe.

12) At around 1:30 a.m., LeLea Rhodes, who was Complainant's friend, was in the market to pick up a job application. She had heard that the market was hiring new employees because they needed help. Ralph Bisbee went into a back room to find an application for Rhodes. Nina and Roy Fremont were in the market and had watched Complainant put the money into the safe. Donna Robbins, who was Bisbee's girlfriend and one of Respondent's employees, was in the market, but was not working at the time. Bob Wheeler, a friend of Bisbee's, was in the store to buy beer. A male customer, Donald Thomas, was in the market making a hot dog.

13) At around 1:30 a.m., Bob Santella and Kelly Haines came into the market. Santella is an "older," stocky white man. Haines is a "younger," slender white man. They were intoxicated and disruptive. Santella was staggering and smelled of alcohol.

14) Santella asked Complainant for her name. She refused to tell him. She did not know Santella or Haines, and believed they were drunk. She asked Santella who he was, which angered him. He said it did not matter who he was and demanded that she write her name for him. Complainant refused to write down her name and told him he could not talk to her that way because he did not hire her. Santella said that it did not matter who hired her because he was a part owner of Franko Oil from Salem. Santella repeatedly ordered Complainant to write down her name and demanded that she come out from behind the counter or he would slap her "black face." Complainant told Santella that she knew her rights and he had no right to talk to her that way. Complainant did nothing to provoke him. When Ralph Bisbee heard loud voices, he came from the back room and asked Santella who he was. Santella never identified himself by name, but said he was a part owner of Franko Oil and asked Bisbee for his name. Haines never identified himself by name. Santella and Haines opened and consumed chicken sandwiches and wine coolers while they were in the store. Bisbee telephoned Nick Rudge, who told Bisbee and Complainant to remove Santella and Haines from the market because he did not know who the two men were. Bisbee told Santella and Haines to leave the market. Santella told Bisbee that he (Santella) had talked to Mike of Franko Oil. Bisbee responded that he had already talked to Rudge and repeatedly told Santella to leave the store. Nina called the police. Haines tried to get Santella to quiet down. Mike called the market and talked with Bisbee. Bisbee reported that Rudge had told him not to leave the market. Mike told Bisbee and Complainant not to leave the market.

15) Santella demanded that Complainant write down her name or she was fired. When she refused, Santella told Complainant that she was fired and he wanted her to come out from behind the counter. During the time he was in the market, Santella referred to her several times as "you black bitch," "you mother fucking black bitch," and as a "black mother fucker." He became more angry when she refused to come out, and he reached over the counter toward her. Bisbee moved himself between Complainant and Santella. Bisbee was upset and told Santella to leave Complainant alone. Nina and Roy Fremont, who are white, gathered around Santella to keep him away from Complainant. They told Santella to stop treating Complainant that way. Santella told Bisbee to get out of the market and then said he wanted everyone out of the market. Complainant tried to call the police, but Santella was rushing at her and she decided she needed to get out of the market. She was afraid Santella was going to hurt her. Complainant ran out of the door yelling at Santella that he had better not touch her. Santella chased Complainant to her car and yelled that she should not bring her "black ass" back on the premises ever again because she was fired. Complainant said he could not do that and "you'll give me my check." Santella chased Complainant's car down the road, yelling racial slurs at her. Then he and Haines forced everyone out of the market.

16) Complainant drove straight home and met her husband, Guy

Smith. She was upset and shaking. Bob Wheeler drove Ralph Bisbee to Complainant's house. Bisbee told Smith what had just happened and that Complainant had been fired. Smith said he was going to go back to the market to find out who the two men were.

17) The market was open when Smith arrived. Smith went in and saw both Santella and Haines. He told Santella that nobody touches his wife and calls her names. Smith asked Santella to pay Complainant if he had fired her. Smith invited Santella to step outside the market, but Santella refused. He told Smith to leave the property or he would call the police. Haines told Smith to go home, that Complainant had no need to come back to work, that the market would not reopen that night, and that they would give Complainant her paycheck.

18) When Smith returned home he was very upset. He called the police. In response, the police went to the AM/PM Market and talked with Santella and Haines. The officer later gave Complainant and Smith the names of Santella and Haines.

19) On September 12, Smith called Nick Rudge. Rudge gave Smith a telephone number for Respondent. When Smith called Respondent, a woman said they had no record of Complainant being fired and told Smith that Respondent had 72 hours to pay Complainant. Later, someone from Respondent called and said that a meeting would be scheduled regarding Complainant.

20) Between September 12 and September 18, 1987, Complainant was not put on the schedule for work.

21) Sometime between September 12 and 18, 1987, Complainant called Nick Rudge about her wages. Rudge told her not to worry, that a meeting was scheduled to talk about what had happened, and that Complainant would get her job back and get paid. He told her that "they" could not fire her because he had hired her. Rudge was upset about what had occurred the night before because, instead of Santella and Haines being removed from the market, everyone else had been removed and the market had been closed.

22) Respondent held a meeting on September 18, 1987, at the market. Attending the meeting were: Complainant; Smith; Mike; and David W. Alderman, Respondent's representative from Salem. Complainant explained what happened on night of September 11. Alderman said he knew Bob Santella and Kelly Haines and had talked with them. He said Santella and Haines were Respondent's employees, but were not part owners. He said Santella and Haines admitted that they had been drinking on September 11 before they went to the market, and he apologized for their behavior.

23) Alderman said he was happy about the way Complainant had handled the incident of the cash in the drawer (see Findings of Fact 11 and 12) and was proud of her work. Complainant was to be paid her wages and put back to work. After talking with Smith, Alderman agreed to put Complainant on a day shift because of what had happened.

24) Alderman wrote down what happened on a small piece of paper. He told Complainant that she needed to "sign this paper to straighten out all their records" so that Respondent "could pay her and get her back to work." She "jumped on it." Complainant trusted Respondent and did not read the papers. A form she signed listed various violations of rules warranting immediate termination. A place denominated "Voluntarily Quit" was checked. Alderman said that the papers showed that Complainant was resigning and would be reinstated on the day shift. The form was signed by Complainant and David W. Alderman on September 18, 1987.

25) At the meeting Complainant did not receive a schedule of shifts because Alderman told her that a schedule had to be worked out, and her supervisor would call her in a couple of days.

26) At the end of the meeting, Respondent paid Complainant $75.00 cash for wages due. Nick Rudge had loaned Complainant some money, and after the meeting Complainant repaid him. Smith told Rudge that he did not want Complainant to work nights. Rudge said he could guarantee that Complainant would be back to work and would not work nights.

27) Immediately after the meeting with Complainant, Nick Rudge was called into a meeting with Alderman and Mike. Rudge's employment was terminated. On the termination form, "Terminated" was checked and "Management style conflict" was written under "Comments." The form was signed by David W. Alderman on September 18, 1987.

28) Complainant left the meeting very happy because she thought she was going back to work. She needed the job very much. She thought the situation was resolved.

29) Martha Hunter was the supervisor of the day shift at the market. As supervisor, it would have been her responsibility to call Complainant to work on the day shift. Respondent never told her to call Complainant for work. Complainant's name was never put on the schedule. Respondent hired an older white female the day after Complainant's termination to replace her. Hunter's employment was terminated on November 23, 1987.

30) On September 21, at around 2 a.m., Guy Smith answered a call in which a man said Complainant was supposed to come to the market to work at that time. Complainant did not go because of the hour and it was not the shift that had been agreed to at the September 18 meeting. The next day, Complainant called the market and the employees on duty did not know anything about the telephone call to Complainant the night before.

31) The next Monday, Complainant called again and learned that Rudge had been fired. No one knew when Complainant would be recalled to work. Complainant was never contacted by Mike. Two or three days later, Complainant went into the market and said hello to Mike, who acted as though he did not know her. Complainant went into the store several times after the meeting on September 18. She was never put back on the schedule. She was told by employees in the market that Respondent would contact her.

32) During the next two to three weeks, Complainant was moody and difficult to live with. About three weeks

after the meeting, Complainant started to look for work elsewhere because she had not heard from Respondent.

33) Complainant applied to be a cashier at a Kentucky Fried Chicken restaurant, at a 7-11 store, at two Plaid Pantry stores, several nursing facilities including Green Acres, and a Taco Time restaurant. She used AM/PM Market as a reference because it was her last job. Complainant was interviewed for a job at the Plaid Pantry, but was turned down. She was interviewed and tested for the job at the 7-11 store, but did not hear from them thereafter. She had difficulty looking for jobs because she had to ride the bus during her search. She became frustrated.

34) When Complainant applied at a 7-11 store across the street from the market, an "older gentleman" told Complainant that he had heard about the "ruckus" involving Complainant at the market and that it was heard "all over the neighborhood."

35) Complainant applied for unemployment compensation. She was not eligible, apparently based in part because of her employment in California, and thus did not receive any compensation.

36) On October 28, 1987, Ralph Bisbee was terminated by Respondent. The termination notice said he "was put on temporary suspension and failed to show up for meeting." Bisbee told Guy Smith that he quit because of the way Complainant had been treated.

37) Complainant's husband, Guy Smith, was employed as a long haul truck driver. During the spring and summer of 1988, Complainant could not find work. On weekends she rode in the truck with her husband to keep him company on trips to California. While in California, she looked for employment. During the week she looked after her children and looked for employment. About a month before November 23, 1988, she learned that she needed surgery and so stopped riding with her husband. Smith gave Complainant money, which she used to buy things for the children.

38) During the fall of 1988, Complainant took refresher courses at Mt. Hood Community College to obtain an Oregon cosmetology license. She had been a licensed cosmetologist in California. She studied for around four hours per day for three months. She continued to look for work during that period.

39) Between January 1988 and November 23, 1988, Complainant estimated that she applied for around five or six jobs.

40) On November 23, 1988, Complainant had surgery. She was unable to work immediately after the surgery. In January 1989, she went to work at the Altheim Care Center as a housekeeper. She was paid $5.00 per hour. She did not use the market as a reference.

41) Complainant had moved to Portland from California in 1987. The job with Respondent was the best job she had been able to find. Jobs were hard to find in Portland.

42) After she lost the job with Respondent, Complainant was mean to her husband, who she had married in July 1987. She blamed him for her staying in Oregon. She wanted to leave him and move back to California to find employment. She had felt proud of her job. The job made her feel that she was able to support her family and stay in Oregon. She felt ashamed, embarrassed, depressed, and hurt when she lost the job. Losing it was "like a slap in the face." She felt that she had been treated disrespectfully by Respondent and not treated like a human being. She felt scared when she was chased out of the store. Complainant had never had any problem with racial discrimination during previous employment. It made her "pretty hysterical" when she was called racial slurs by Santella. She was made to feel different. Complainant's children and their friends knew Complainant had worked at the market. She never told her children what happened when she lost the job because she did not want her children to be prejudiced. She experienced unexplained crying spells after the termination. When her children noticed changes in Complainant, she and her husband told them that she did not feel well. She lived near the market, and knew and liked the neighbors and customers of the market. She wanted to move away from the neighborhood after she lost the job. Guy Smith believed that Complainant had not completely recovered from her mental suffering at the time of the hearing.

43) Complainant's testimony was credible. Her demeanor was calm and forthright, even where her memory was deficient and unsupportive of her complaint. She responded to questions without hesitation and made no effort to avoid any issue. Her testimony and LeLea Rhodes's testimony regarding measurements of time were inconsistent and unreliable; thus, the Forum made no finding of fact regarding the amount of time covered by the incidents on the night of September 11. However, the Forum finds that those inconsistencies reflect the witnesses' problems with measuring time rather than any intention to deceive the Forum. Complainant's statements were supported by testimony from other witnesses, who the Hearings Referee found credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Franko Oil Company was an Oregon corporation and owner/ operator of an AM/PM Market located at 9200 SE Holgate in Portland, Oregon, and an employer in this state utilizing the personal services of one or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Complainant was employed by Respondent as a cashier at the 9200 SE Holgate, Portland, Oregon AM/PM Market between August 28 and September 12, 1987.

3) Complainant is a black person.

4) Complainant was discharged from employment by Respondent's agents because of her race and/or color.

5) Between September 12, 1987, and November 23, 1988, Complainant would have earned $10,392, as calculated in the Damages section of the Opinion (which section is incorporated herein by this reference), but for the discharge.

6) Complainant suffered severe and long-lasting mental distress as a

direct result of Respondent's action of racially harassing and discharging her. Respondent's actions caused Complainant to suffer shame, embarrassment, depression, frustration, and impaired human dignity.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) The actions, inactions, and knowledge of Bob Santella and David Alderman, employees or agents of Respondent, are properly imputed to Respondent.

4) ORS 652.030(1) provides, in part:

> "For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, 659.400 to 659.460 and 659.505 to 659.545, it is an unlawful employment practice:
>
> "(a) For an employer, because of an individual's race, * * * [or] color * * * to refuse to hire or employ or to bar or discharge from employment such individual."

Respondent violated ORS 659.030 (1)(a).

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

The Agency alleged that Respondent violated ORS 659.030(1)(a) by discharging Complainant from employment because of her race and/or color. The disputed issues were:

1) Did Respondent discharge Complainant?

2) If so, was the discharge because of Complainant's race/color?

The Discharge

Respondent asserted that there was no evidence that Santella had the authority to discharge Complainant and, if he did, he was acting outside of the scope of his employment.

The Agency presented undisputed evidence that employees of Respondent entered the market while Complainant was working; that one of those employees, Bob Santella, represented himself to be a part owner of Respondent; that he threatened her with discharge, told her she was fired, and chased her out of the market; that he repeatedly called Complainant racial slurs; that Respondent subsequently misrepresented the contents and effect of a document presented to Complainant for signature; and that Respondent did not scheduled Complainant for her regular hours of work the following week or ever again.

Respondent bears the burden of rebutting the inference of discrimination established by the Complainant's *prima facie* case. OAR 839-30-010 (2)(b); *and see Texas Department of Community Affairs v. Burdine*, 450 US 248, 25 FEP 113 (1981), which this Forum has previously followed. While not an onerous burden, Respondent nonetheless must come forward with some evidence to substantiate its rebuttal or defense. ORS 183.450(2).

In this case, Respondent has failed to offer any evidence to support its argument that Santella was acting outside the scope of his authority in discharging the Complainant. With no evidence before it to the contrary, on the basis of the facts recited above, the Forum finds that Santella did possess the authority to discharge the Complainant and that he did so. This inference is based on Santella's assertion of his authority, his exercise of that authority, the Respondent's subsequent failure to schedule Complainant for her normal shifts, and Respondent's misrepresentation of the contents and effect of the purported resignation. To infer that Santella did not possess the authority he claimed would be unreasonable: It would amount to finding that Complainant, who was evaluated by Respondent as a good employee, was racially harassed by a drunken co-worker and that Respondent's response was to terminate the Complainant.

Even if Respondent had introduced evidence on the scope of Santella's employment, and such evidence had established that he did not possess the authority to discharge Complainant, Respondent would nonetheless be liable in these circumstances for the reason that it subsequently ratified Santella's action: Respondent was fully informed of the circumstances of Complainant's purported discharge and of Santella's assertion of authority to do so. Rather than repudiate Santella's action, Respondent gave effect to and ratified the discharge by refusing to schedule Complainant for work and by obtaining her signature on the purported resignation through deception.

Respondent presented evidence that Complainant "voluntarily quit" in the form of a document signed by Complainant during the meeting with Respondent's representatives. However, Complainant and her husband credibly testified that David Alderman explained to them that the papers she signed were necessary to put her back to work on a day shift. She took great pride in her job and needed it to help support her family. She and her husband testified, and the Forum found, that Alderman assured Complainant that she would be contacted by her supervisor within a couple of days of the meeting about a day shift schedule. It would be inconsistent with all of the credible evidence to conclude that Complainant and her husband met with Alderman and another Respondent representative to discuss her return to work, and then she voluntarily quit.

There was evidence that three days after the meeting Complainant's husband received a call from a man at 2 a.m. telling Complainant to come to work at that time. Complainant did not go because of the hour, and it was not the shift that had been agreed to at the September 18 meeting. The next day, Complainant called the market, and the employees on duty did not know anything about the telephone call to

Complainant the night before. There was no evidence presented that Respondent terminated Complainant because of this event, and the Forum declines to draw such an inference. The fact is that Complainant was assured by Respondent that she would be scheduled to work on a day shift. Martha Hunter, the day shift supervisor, was never instructed to contact Complainant. Complainant's name was never put on the schedule.

From the facts found, it is reasonable to infer that Santella had the authority to discharge Complainant, and did so. None of Respondent's ineffective actions or assurances thereafter changed that fact.

Cause for the Discharge

Respondent asserted that Complainant was an "at-will" employee during the first six months of employment and could be discharged without notice. The employment "at-will" concept is premised upon the idea that an employer and employee are both free to terminate the employment relationship at any time and for any cause, unless expressly prohibited by contract or statute, or unless the termination constitutes a "socially undesirable motive," that is, the tort of wrongful discharge. *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 689 P2d 1292, 1295 (1984). Here, Complainant is a member of a class of people protected by a statute that expressly prohibits the termination of an employment contract based on an employee's protected class. ORS 659.030(1)(a).

Undisputed facts showed that Respondent's employee, Santella, confronted Complainant with demands that she reveal her name. Neither he nor Haines ever identified himself, and so she refused. Additional undisputed evidence showed that a white employee, Ralph Bisbee, conducted himself in a manner similar to that of Complainant -- namely, he asked Santella his name and did not reveal his own name when Santella demanded it. In addition, Bisbee ordered Santella and Haines to leave the market. Despite Complainant's protests, Santella repeatedly called Complainant racial slurs before and after he threatened her, fired her, and chased her from the market. There is no evidence that Santella threatened Bisbee or called him names. Santella ordered Bisbee out of the market but did not fire him. Complainant was treated differently from Bisbee, and it is reasonable to infer from the evidence that the difference was because of race or color. It is also reasonable to infer that Respondent, through its agent Santella, discharged Complainant because of her race or color. None of Respondent's ineffective actions following the discharge change that fact.

Respondent had the burden of presenting evidence to show it had some legitimate, nondiscriminatory reason for discharging Complainant. OAR 839-05-010(2)(b); *Texas Department of Community Affairs v. Burdine, supra.* Respondent presented no such evidence.

Damages

In *In the Matter of Baker Truck Corral, Inc.*, 8 BOLI 118, 138-39 (1989), the Commissioner did not compute back wage damages beyond the amount prayed for in the Specific Charges where the Agency did not move to amend the prayer to conform

to the evidence. In that case, however, the evidence permitted only an inference about the time period that the complainant looked for work following her discharge. The Commissioner declined to "speculate" about part of that time period, "there being no point in computing above what was asked for."

This case is different from *Baker Truck Corral.* Here, no speculation about the evidence is necessary to compute Complainant's back wages. The evidence about her back wage damages came in without objection and was uncontroverted. The Agency sought back pay damages for the period from the discharge on September 12, 1987, to the date of Complainant's surgery on November 23, 1988, or a period of approximately 62 weeks. The Agency calculated those damages to be $8,442. That calculation was erroneous.

> "The Hearings Referee has the right and duty to conduct a fair and full inquiry and create a complete record. *See* ORS 183.415(10); *Berwick v. AFSD*, 74 Or App 460, 703 P2d 994 (1985). Where errors are detected, the Hearings Referee is empowered to cause them to be corrected. This is especially true where there are arithmetic errors or other similar computation oversights."

In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 259 (1987); *see also* OAR 839-30-075(2)(b) and 839-30-100(1)(k). Therefore, the Hearings Referee, and certainly the Commissioner, are authorized to compute this Complainant's back wages in accordance with the evidence received at hearing.

Complainant was employed six days per week, eight hours per day, at $3.25 per hour.* Thus, her weekly rate of pay was $156 (eight hours times six days equals 48 hours per week, times $3.25 per hour equals $156 per week).

Accordingly, during the next two weeks, Complainant would have earned $312 but for the discharge (two weeks times $156 per week equals $312). The facts showed that she had worked approximately two weeks when she was discharged and that she had been a good employee. Nick Rudge assured her that she would get a raise of from 25 to 50 cents per hour after she had been employed 30 days. Thereafter, her hourly rate of pay would have been no less than $3.50 per hour for the period from September 28, 1987, (which was 30 days after she was hired) to November 23, 1988 -- a period of approximately 60 weeks. During that period, her weekly rate would have been $168 (48 hours per week times $3.50 per hour equals $168 per week). There was some testimony that Complainant might have gotten future raises at six month intervals. However, the evidence was insufficient to determine the amount of such raises or whether Complainant would have been eligible for them. Accordingly, during the next 60 weeks, Complainant would have earned $10,080 (60 weeks times $168 per

* During all times material, the state and federal minimum wages were $3.35 per hour. Because no evidence was presented on this issue, the Forum declines to speculate about whether Complainant's stated hourly wage of $3.25 was the correct or lawful wage.

week equals $10,080). In total, Complainant lost back wages of $10,392 ($312 plus $10,080 equals $10,392) due to the discharge.

Pursuant to OAR 839-30-105(10), Respondent had the burden of showing that Complainant failed to mitigate her damages. *See also In the Matter of Lucille's Hair Care,* 3 BOLI 286, 301 (1983), *aff'd,* 299 Or 98, 699 P2d 189 (1985); *In the Matter of Lee's Cafe,* 8 BOLI 1, 20 (1989). Complainant's and Guy Smith's undisputed testimony was that Complainant waited for two to three weeks after her discharge in order for Respondent to call her back to work. Thereafter, she searched for work even during trips to California with her husband, and during the time she was taking refresher courses for a cosmetology license. She testified that she had difficulty finding work and that not many jobs were available. Respondent failed to show the availability of jobs equivalent to the job she lost. Respondent failed to prove that Complainant did not use diligence in conducting a job search. In short, Respondent failed to show that Complainant did not mitigate her damages.

The Commissioner is authorized to award compensatory damages if the evidence is sufficient to support the finding that a complainant has suffered forms of mental distress such as humiliation, distress, embarrassment, and anxiety. *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, 571, *rev den* 287 Or 129 (1979). Complainant's testimony regarding her mental suffering was undisputed and persuasive. As found in Ultimate Finding of Fact 6,

> "Complainant suffered severe and long-lasting mental distress as a direct result of Respondent's action of racially harassing and discharging her. Respondent's actions caused Complainant to suffer shame, embarrassment, depression, frustration, and impaired human dignity."

The Forum has awarded to the Complainant $15,000 to help compensate her for the mental distress she suffered as a direct result of the racial harassment and discriminatory discharge by Respondent.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, FRANKO OIL COMPANY, dba AM/PM MARKET, is hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, a certified check, payable to the Bureau of Labor and Industries in trust for DONNA SMITH, in the amount of:

a) Ten Thousand Three Hundred and Ninety-Two Dollars ($10,392), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) One Thousand Eight Hundred Thirty-Nine Dollars and Forty-One Cents ($1839.41), representing interest on the lost wages at the annual rate of nine percent accrued between October 1, 1987, and February 28, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between March 1, 1990, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) Fifteen Thousand Dollars ($15,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Reinstate DONNA SMITH as a cashier in a southeast Portland AM/PM Market with wages commensurate with what she would have been earning at the date of reinstatement had she remained employed by Respondent since September 12, 1987.

3) Cease and desist from discriminating against any worker because of the worker's race and/or color.

4) Take all appropriate steps to ensure and maintain a racially neutral work environment.

5) Post in a conspicuous place on the premises of each of Respondent's AM/PM Markets in Oregon a copy of ORS 659.030, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

In the Matter of

The Society of ST. VINCENT DE PAUL, dba St. Vincent De Paul Salvage Bureau, Respondent.

Case Number 26-90

Final Order of the Commissioner

Mary Wendy Roberts

Issued May 29, 1990.

SYNOPSIS

Complainant, a compensably injured worker, obtained a medical release to his former position with Respondent. His former position was not available when he made his demand for reinstatement, but a suitable position became available in about ten days and again thereafter. Finding that Respondent failed to notify Complainant of suitable positions after his demand, the Commissioner held that Respondent violated ORS 659.415, and awarded Complainant $5,680 in lost wages and $1,000 for mental distress. The Commissioner rejected the argument that unemployment compensation should be deducted from wage loss awards. ORS 659.415; 659.435; OAR 839-06-121; 839-06-130.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 27, 1990, in Room 311 of the Portland State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality

Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined witnesses, and introduced documents. Robert Edmond Flores (Complainant) was present throughout the hearing and was not represented by counsel. James W. Morrell, Attorney at Law, appeared on behalf of The Society of St. Vincent de Paul, dba St. Vincent de Paul Salvage Bureau (Respondent), presented a Summary of the Case, argued the law and facts, made objections and motions, and examined witnesses. Charles Sundborg was present throughout the hearing as Respondent's representative.

The Agency called the following witness: Complainant Robert E. Flores. Respondent called the following witness: Charles Sundborg, Respondent's plant production manager.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about August 15, 1988, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries, alleging he was the victim of the unlawful employment practices of the Respondent, and the Civil Rights Division issued an Administrative Determination finding substantial evidence to support Complainant's allegations.

2) The participants* stipulated that attempts to resolve the matter by conference, conciliation, and persuasion were unsuccessful.

3) On January 16, 1990, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent failed to reinstate Complainant to his former job and failed to reinstate Complainant to other available and suitable work following a compensable on-the-job injury. The Specific Charges alleged that Respondent's action violated ORS 659.415.

4) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings

5) On February 6, 1990, the Hearings Unit received Respondent's timely answer in which it denied the allegations mentioned above in the Specific Charges and stated affirmative defenses.

6) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file.

* "Participant" or "Participants" includes the charged party and the Agency. OAR 839-30-025(17).

7) On March 21, 1990, Respondent's attorney requested an extension of time to file Respondent's Summary of the Case. The Hearings Referee granted the request. Respondent filed a Summary of the Case on March 22, 1990.

8) A pre-hearing conference was held on March 27, 1990, at which time the participants stipulated to facts that were admitted by the pleadings. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

9) At the start of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no more questions about it.

10) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) During the hearing and pursuant to OAR 839-30-075(2)(b), the Agency moved to amend the Specific Charges to conform the damages requested therein to the evidence presented at the hearing. The motion was granted.

12) During the hearing, Respondent moved to strike section III, paragraph 7 of the Specific Charges because no evidence was produced during the Agency's case to show that "On or about July 20, 1988, Respondent hired a new laborer to do work Complainant was qualified to do; this work was available and suitable for Complainant." The Hearings Referee granted the motion to the limited extent that the words "On or about July 20, 1988," were stricken. Respondent also moved to reduce the claimed back wages by the amount of unemployment compensation benefits Complainant received, and moved to strike the claim for mental suffering. The Hearings Referee denied both of those motions for reasons set out in the Damages section of the Opinion, below, which section is incorporated herein by this reference.

13) The Proposed Order, which included an Exceptions Notice, was issued on April 10, 1990. Exceptions, if any, were to be filed by April 20, 1990. No exceptions were received.

FINDINGS OF FACTS – THE MERITS

1) At all times material herein, Respondent St. Vincent de Paul Salvage Bureau was an assumed business name of the Society of St. Vincent de Paul, a nonprofit corporation operating a sheltered workshop, and an employer in this state utilizing the personal services of six or more employees.

2) During 1984, Complainant lived at 415 SW Montgomery, Portland. He wrote that address on Respondent's job application. He listed the building manager's phone number as a message number. In addition, he wrote his brother's address and telephone number as a message number. Complainant lived at the Montgomery address until he moved in September or October 1988. Complainant informed the Agency and the post office but not Respondent of his change of address.

3) Complainant was employed by Respondent as a laborer between August 9, 1984, and July 19, 1988.

4) As a laborer, Complainant's duties included carpentry, driving trucks, picking up furniture and food, working with clothing and small appliances, and working in the warehouse and electrical department.

5) Complainant received different rates of pay depending on the department he worked in. For work in some departments he was paid $3.50 or $3.75 per hour. During the month of December 1987, Complainant drove a truck for a food drive, for which he was paid $5.00 per hour. He worked eight hours per day, five days per week, and averaged 40 hours per week.

6) Complainant sustained a compensable injury on or about December 11, 1987.

7) Complainant underwent surgery on his knee on December 15, 1987.

8) Complainant filed a workers' compensation claim, which was accepted by SAIF Corporation for the condition of "left knee patellar subluxation." He was off work from December 11, 1987, to July 18, 1988.

9) During the time Complainant was off work, Charles Sundborg, who was Complainant's supervisor and Respondent's plant production manager, called Complainant's message phone number. Sundborg was told that Complainant no longer lived at that location or that the speaker did not know where Complainant was.

10) Complainant was given an unconditional medical release to return to work on July 18, 1988.

11) Complainant was physically able to perform the duties of his former job.

12) Complainant presented his medical release to Respondent and requested to be returned to work on or about July 18, 1988.

13) On July 18, 1988, Complainant went to his workplace to talk with Sundborg. Sundborg was on vacation, so Complainant talked with the assistant manager, Don Bye. Bye told Complainant to come back the next day.

14) Complainant was told by Respondent on or about July 19, 1988, that he was laid off and there was no work available.

15) Sundborg told Complainant to return his uniforms and draw unemployment compensation because there was no work available. Sundborg told "him to check in later on" because there might be work available.

16) At that time, it had been Sundborg's experience that injured workers who wanted to return to work would check in with Respondent daily, weekly, or monthly about the availability of work. Sundborg told injured workers to keep in contact with the company about the availability of work. He expected Complainant to check in likewise.

17) Respondent had no written policy about how injured workers were to be returned to the job or how injured workers were to be notified about available and suitable positions. If a suitable job was available, Respondent would try to call an injured worker if it had a telephone number for the worker, or would notify the worker if the worker checked in.

18) On July 19, 1988, Sundborg believed that Complainant was capable of returning to his former duties. Respondent did not question Complainant's ability to perform the duties of his former job. Respondent never asked Complainant to consult with a doctor other than Dr. Fredrick D. Wade, who had given Complainant the medical release to return to work.

19) After July 19, 1988, Respondent never attempted, by phone or letter, to contact Complainant about any job.

20) After July 19, 1988, Complainant did not call or write to Respondent for work.

21) On July 29, 1988, Respondent hired Gregory Beson as a "truck helper." On August 11, 1988, Respondent hired Gary Slack as a "washer." On October 21, 1988, Respondent hired Robert Lenox as a truck helper. Complainant was qualified to do the truck helper job and the washer job.

22) Between July 19, 1988, and February 13, 1989, Complainant collected unemployment compensation and sought other jobs. He applied at trucking, warehouse, and steel manufacturing businesses. He was not hired for another job.

23) Around November 30, 1988, Dr. Wade referred Complainant to a Dr. Baldwin because of a "popping" in Complainant's knee. Complainant underwent therapy on his knee. He stopped looking for work when he again applied for workers' compensation on February 13, 1989. He received workers' compensation and had a second surgery on his knee around August 23, 1989. From that date to the date of hearing, Complainant was not released to return to work.

24) The loss of employment with Respondent caused Complainant to suffer financial distress. He was unable to pay his rent and had to move out of his home on Montgomery Street. He moved in with a friend in southeast Portland. The loss of wages affected his ability to pay his bills, and he got to the point that he "just didn't really care anymore * * * Everything I tried, I couldn't, they wouldn't hire me." He was unable to find work that he was qualified for.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed six or more persons within the State of Oregon.

2) At all times material, Complainant was a worker employed by Respondent as a laborer.

3) On December 11, 1987, Complainant was injured on the job. He applied for and received benefits in accordance with the Oregon workers' compensation procedures.

4) Effective July 18, 1988, Complainant was fully released by his treating physician to return to his former job.

5) Complainant was physically able to perform the duties of his former job.

6) On July 18, 1988, Complainant made demand for his former job.

7) At the time of Complainant's demand to return to work, Respondent had no suitable jobs available.

8) On July 29, 1988, Respondent had a suitable job available.

9) Respondent did not offer that job, or other later available and suitable jobs, to Complainant. Respondent

never reinstated Complainant to his former job or to an available and suitable job.

10) Complainant made a reasonable effort to obtain employment for which he was qualified and which he was able to perform until February 13, 1989.

11) Complainant was no longer able to perform his former job on or after February 13, 1989.

12) Complainant's final rate of pay was $5.00 per hour. He worked 40 hours per week. Between July 29, 1988, and February 13, 1989, Complainant lost wages of $5,680 ($5.00 per hour times 40 hours per week equals $200 per week; July 29, 1988, to February 13, 1989, is a period of 28.4 weeks; 28.4 weeks times $200 per week equals $5,680).

13) Complainant suffered financial distress, prolonged unemployment, and apathy due to Respondent's failure to reinstate him to his former job or to an available and suitable job.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and ORS 659.400 to 659.435. *See* ORS 659.400(3), 659.010(12), and (13).

2) Complainant was Respondent's "worker," as that term is used in ORS 659.415. *See* OAR 839-30-105(4).

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. *See* ORS 659.435 and OAR 839-06-121.

4) The actions, inactions, and knowledge of Charles Sundborg, an employee or agent of Respondent, are properly imputed to Respondent.

5) ORS 659.415 provides, in pertinent part:

> "(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, provided that the position is available and the worker is not disabled from performing the duties of such position. If the former position is not available, the worker shall be reinstated in any other position which is available and suitable. A certificate by a duly licensed physician that the physician approves the worker's return to the worker's regular employment shall be prima facie evidence that the worker is able to perform such duties.
>
> "(2) * * *
>
> "(3) Any violation of this section is an unlawful employment practice."

Respondent violated ORS 659.415.

6) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 659.400 to 659.435, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

This is a case of a simple failure by an employer to reinstate an injured worker.

> "It is a *per se* violation of ORS 659.415 not to reinstate an employee when reinstatement is required. A discriminatory motive need not be proved to establish a violation of the statute * * *." *Palmer v. Central Oregon Irrigation District*, 91 Or App 132, 136, 754 P2d 601, 603 (1988).

The statute, ORS 659.415, says that an injured worker

> "shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, provided that the position is available and the worker is not disabled from performing the duties of such position."

The Commissioner has adopted rules, as authorized by ORS 659.103, to carry out the purpose of ORS 659.415. The Oregon Supreme Court has said,

> "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute." *Bronson v. Moonen*, 270 Or 469, 476-77, 528 P2d 82 (1974).

An employer's ignorance of the law is not a defense for its failure to comply with the requirements of the law. *See In the Matter of John Owen*, 5 BOLI 121, 128 (1986).

OAR 839-06-100 to 839-06-165 cover "Injured Workers: Prohibited Discrimination (ORS 659.410) and Reinstatement/Reemployment Rights (ORS 659.415 and 659.420)."

OAR 839-06-130(1) provides, in pertinent part:

> "ORS 659.415 deals with the reinstatement/reemployment rights of injured workers who are not disabled from performing the duties of their former jobs. To exercise rights under ORS 659.415 <u>the injured worker must</u>:
>
> "(a) Be <u>physically able to perform the duties of the former job</u>:
>
> "(A) Prima facie evidence of the injured worker's physical ability to perform his/her former job is a physician's approval by certificate for the injured worker's return to his/her former job. * * *
>
> "(B) Although the physician's approval by certificate is prima facie evidence, the employer may question it. The employer may require, within a reasonable period of time, further evidence of the worker's physical ability to perform the job * * *.
>
> "(C) The employer may not use questioning of the physician's certificate as a subterfuge to avoid its responsibilities under ORS 659.415.
>
> "(b) <u>Make demand for the former job</u> * * *." (Emphasis supplied.)

Thus, in order to be reinstated to a former job, an injured worker must be physically able to perform the duties of the former job. Here, Complainant presented his physician's approval by

certificate for his return to his former job. Respondent never questioned the physician's certificate and never required further evidence of Complainant's physical ability to perform the job. Respondent presented evidence that in November 1988 Complainant was having some trouble with his knee. *See* Finding of Fact 23. That evidence is insufficient to prove that Complainant was unable to perform his former job and does not satisfy the requirements of OAR 839-06-130(1)(a), above, to overcome the prima facie evidence of the physician's certificate.

In addition to being able to perform the duties of the former job, the injured worker must make demand for the former job. On this point, there was no dispute. *See* Finding of Fact 12.

When a worker is able to perform the duties of the former job and has made demand for the job, he or she "shall be reinstated * * * to the worker's former position * * * provided that the position is available * * *." ORS 659.415(1). Here, Complainant's former job was not available. ORS 659.415(1) provides, in pertinent part:

> "If a former position is not available, the worker shall be reinstated in any other position which is available and suitable."

Here, no suitable jobs were available when Complainant made his demand to return to work. *See* Ultimate Finding of Fact 7. OAR 839-06-130(5)(a) provides, in pertinent part:

> "If, at the time of the injured worker's demand to return to work, the employer has no suitable jobs available, the employer's obligation to reinstate/reemploy the injured worker continues until the employer offers the injured worker the next suitable job which becomes available. The employer can offer an available and suitable job to the injured worker according to the employer's non-discriminatory and written policy which has been effectively made known to the employer's work force and is practiced by the employer. If the employer has no such policy, the employer can satisfy this obligation by mailing, regular and certified mail, a written offer to the injured worker's last known address. * * *"

The facts in this case show that Respondent had no written policy for offering jobs to injured workers seeking to return to work. Respondent's practice was to tell injured workers to check in periodically. Respondent would try to call a worker if it had the worker's telephone number or would notify the worker if the worker checked in. Those efforts do not satisfy Respondent's obligation under the law. It is not the injured worker's obligation to report to the employer, unless the employer has a non-discriminatory and written reporting policy. *See* OAR 839-06-130(2). Here, Respondent had none.

At least two suitable jobs became available during July and August 1988, and Respondent made no attempt to contact Complainant. Mr. Sundborg's reason was that he had once called Complainant's message number before he was released to return to work and learned that Complainant no longer lived at that location, or that the speaker did not know where Complainant was. Mr. Sundborg concluded that he had no way to contact Complainant.

These are the kind of facts that the rule, OAR 839-06-130, is designed to handle. Since the employer has the statutory obligation to reinstate an injured worker, it is the employer that has to create a written policy and practice for the worker to report in, and for offering the worker an available and suitable job. Without such policies, the rule provides that an employer may satisfy its obligation by mailing, by regular and certified mail, a written offer to the worker's last known address. Here, Respondent had Complainant's correct address on his job application.

An Employer does not satisfy its statutory obligation by making an unsuccessful telephone call. If it were otherwise, employers could easily circumvent their obligations by claiming to have made unsuccessful telephone calls to injured workers about available jobs.

There was no evidence in this case that Respondent attempted to circumvent the law. The evidence suggests that Respondent was ignorant of the law's requirements. However, as stated above, ignorance of the law is no excuse for Respondent's failure to satisfy its legal obligation. Respondent argued at hearing that since the Agency did not charge it with violating OAR 839-06-130, it was unfair to consider the evidence that it did not follow the rule's requirements. That argument misses the mark because it is unnecessary for the Agency to charge the Respondent with violations of any of the rules that are related to ORS 659.415. Once the Agency has charged a respondent with a violation of the statute, the issues addressed by the rules are clearly within the scope of issues to be addressed at hearing. Here, Respondent raised in its answer this issue of its failure to contact Complainant about an available job:

> "III.
>
> "* * * Complainant was told to keep in touch with respondent, as respondent did not know how to reach complainant.
>
> "IV.
>
> "Some days later, respondent had a job opening for a "laborer," but was forced to fill said opening with another person due to the fact that complainant had not kept contact with respondent and respondent had no way of knowing where to contact complainant."

Evidence on this issue came in without objection. OAR 839-30-120(4) states that

> "[a]ll offered evidence to which there is no objection may be received by the Hearings Referee subject to the Hearings Referee's power to exclude irrelevant, immaterial or unduly repetitious matter."

Accordingly, such evidence was received and considered by the Hearings Referee.

Damages

Complainant should have been reinstated on July 29, 1988, when a suitable job became available. Although the employee who was hired to do that job worked only two or three days, there was no evidence regarding the circumstances surrounding that worker's termination. There was no evidence from which to conclude that Complainant would have been

terminated after two or three days, especially in light of the fact that he had worked for Respondent for four years. Complainant was capable of working in several departments, and the facts suggest that Complainant had been transferred around as Respondent's needs changed. It is reasonable to infer from the facts found that Complainant would have been continuously employed by Respondent until he was again no longer physically able to work on February 13, 1989. Accordingly, Complainant is awarded back pay at his final rate of pay from July 29, 1988, to February 13, 1989. *See* Ultimate Finding of Fact 12.

Respondent argued that Complainant's back pay should be reduced by the amount he received in unemployment compensation and contended that otherwise Complainant would get "double pay." Recently, the Oregon Court of Appeals ruled that unemployment benefits should have been offset from an employee's damages in a breach of employment contract case. *Filter v. City of Vernonia*, 95 Or App 550, 552-53, 770 P2d 83 (1989). In that case, the employee brought her action against a political subdivision of the state. Citing *Seibel v. Liberty Homes, Inc.*, 305 Or 362, 752 P2d 291 (1988), the court said:

> "[The Oregon Supreme Court held that] Social Security benefits should not be deducted from a damage award in a breach of employment contract action. However, the court specifically declined to rule on whether unemployment compensation benefits could be deducted. 305 Or at 368; *see also* 305 Or at 373 n 2 (Peterson, C.J., concurring in part and dissenting in part). * * * [The Supreme Court stated that] the determination of whether a worker's damages in a wrongful discharge case should be reduced by benefits received depends on the source of the benefits. 305 Or at 365.
>
> "The Supreme Court reasoned that offsetting Social Security benefits could result in employers performing a cost/benefit analysis that favors breaching employment contracts. The court noted that that is especially true when the benefits that the employer seeks to offset come from a social program funded by parties other than the employer. 305 Or at 367-68." 95 Or App at 552.

The Court of Appeals found that the City of Vernonia contributed to the unemployment program and said that:

> "we believe that the increased rates and direct contributions that can result after an employee's claim are a significant disincentive to employers engaging in the type of cost/benefit analysis contemplated in *Seibel*. Further, unlike with Social Security benefits, allowing an employer to offset unemployment benefits is more likely to prevent either party from enjoying a windfall at the expense of the social program, because the employer ultimately bears the cost through increased rates." 95 Or App at 553.

The court concluded that the trial court erred in refusing to offset the employee's unemployment benefits.

City of Vernonia can be distinguished from this case. This is not a breach of contract case in which an employer may lawfully weigh costs and benefits of a contractual breach. This is a statutory unlawful employment practice case. This Forum has long held that unemployment benefits received by a successful complainant in an employment discrimination case are not offsets against a back pay award.

> "In 1983, the US Court of Appeals, Ninth Circuit, affirmed a case from the US District Court for the District of Oregon. Citing the [*National Labor Relations Board v. Gullett Gin Co.*, 340 US 361, 364, 27 LRRM 2230 (1951)] case with approval, the court held 'that unemployment benefits received by a successful plaintiff in an employment discrimination action are not offsets against a back pay award.' *Kauffman v. Sidereal Corp.*, 695 F2d 343, 346-47, 32 FEP Cases 1710, 1712-1713 (9th Cir 1982)." *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 67 (1987), *aff'd Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

It is not the public policy of the State of Oregon to encourage or reward the weighing of the costs and benefits of discrimination. *See* ORS 659.015 and 659.020. The Commissioner has previously quoted from Judge Burns, who wrote for the US District Court for the District of Oregon in the *Kauffman v. Sidereal Corp.* case, Civil No. 79-142 (D Or 1980), that:

> "it is clear that those (unemployment compensation) programs are meant for the benefit of employees and the community at large, not employers, and especially not employers who violate the rights of employees."

In the Matter of K-MART Corporation, 3 BOLI 194, 204 (1982). To allow employers to offset unemployment compensation benefits in cases of employment discrimination would encourage and subsidize their unlawful practices. The Bureau of Labor and Industries is charged with eliminating and preventing discrimination in employment. ORS 659.100.

Aside from the determinative policy considerations, *City of Vernonia* can be distinguished on its facts. The employer in *City of Vernonia* is a political subdivision and, as such, in lieu of paying unemployment taxes, pays into a fund an amount equivalent to the amount of all regular benefits and all extended benefits paid out to claimants. *See* ORS 657.505(6). Thus, the city paid into the fund the amount that the employee received in unemployment benefits. In other words, the employer was the direct source of the benefits that the employee received. Compare that to Respondent, which would have paid unemployment taxes somewhere within the broadest statutory range of 0.9 to 5.4 percent of its total payroll. ORS 657.462. Here, the Respondent was not the direct source of the benefits paid to Complainant. He was paid from a collateral source (state funds derived from taxes), and thus the reasoning of the US Supreme Court in *Gullett Gin* is persuasive.* In

* This is particularly true when, as in many discrimination cases, a worker

upholding the National Labor Relations Board's refusal to deduct unemployment benefits from an employee's back pay award for discriminatory discharge, the US Supreme Court said:

> "To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.
>
> "But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation to respondent, but to carry out a policy of social betterment for the benefit of the entire state * * *. We think these facts plainly show the benefits to be collateral." *National Labor Relations Board v. Gullett Gin Co.*, 340 US 361, 364, 27 LRRM 2230 (1951) (citations omitted).

Regarding mental suffering damages, Complainant testified credibly that the loss of employment with Respondent caused him to suffer financial distress, prolonged unemployment, and apathy. The loss of wages affected his ability to pay his bills, including his rent, and he had to move out of his home. The Commissioner has previously recognized that the anxiety and uncertainty connected with loss of employment income is compensable. *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982). The specter and uncertainties of unemployment are also compensable when attributable to an unlawful practice. *In the Matter of the City of Portland*, 2 BOLI 41 (1980). The Forum is therefore awarding the Complainant $1,000 to help compensate him for the mental distress he suffered as a result of Respondent's unlawful employment practice.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, The Society of St. Vincent de Paul, dba St. Vincent de Paul Salvage Bureau, is hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, a certified check, payable to the Bureau of Labor and Industries in trust for Robert E. Flores, in the amount of:

a) Five Thousand Six Hundred and Eighty Dollars ($5,680), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) Seven Hundred Thirty-Nine Dollars and Eight Cents ($739.08), representing interest on the lost wages at the annual rate of nine percent accrued between July 19, 1988, and March 31, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between April 1, 1990, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) One Thousand Dollars ($1,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Adopt a non-discriminatory written policy and practice regarding recall procedures and injured workers' rights. The content of such policy is to be pre-approved by the Civil Rights Division of the Oregon Bureau of Labor and Industries.

3) Take all appropriate steps to ensure that any worker who has sustained a compensable injury will be reinstated to his or her former job or the first suitable job available after the employee's demand for such reinstatement, providing that the employee is not disabled from performing the duties of such job.

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is not hired or is discharged after a very short period of employment by a discriminating employer. See, for example, *In the Matter of Franko Oil Company*, 8 BOLI 279 (1990) (the worker was discharged because of her race after working only 11 days). In such cases, the proportion of the unemployment compensation benefits charged to the discriminating employer's account is minuscule or none. Employers previous to the discriminating employer are charged for the major proportion or all of the worker's benefits.